REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

WESTERN DISTRICT.
OPELOUSAS, SEPTEMBER, 1834.

BROUSSARD *vs.* BERNARD ET ALS.*

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Customs result from a long series of actions, constantly repeated, which by such repetition, and by uninterrupted acquiescence, acquire the force of a tacit and common consent.

The particular custom, "*that the community of property continues*, after the death of one of the partners, *until inventory is made*," is required to be proved by other partitions and divisions, that may have been made in the same place, and that it has prevailed without interruption.

The establishment of a custom, necessarily admits proof, other than that required to establish laws.

Parole evidence is inadmissible, to prove the customs of a country.

*The opinion in this case was pronounced and recorded, as of the September term at Opelousas, 1827, but was omitted to be published in Martin's Reports.

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The books and records in the parish judge's office, are legal, and the *proper evidence*, to prove a particular custom, in relation to the continuation of the community, after the death of one of the partners, until inventory is made.

This was a suit, originally commenced at the September term, 1821, of the District Court for the parish of St. Martin, to settle the succession of Mrs. A. Broussard, who died in January, 1816. A community of property existed between her and her husband, the present plaintiff. After her death, the husband continued in possession, and made sales of the community property, without ever taking an inventory. In the year 1819, the forced heirs of the deceased wife, brought suit against the surviving husband, for her half of the community property, and to annul the sales made thereof. A decree was rendered by consent, annulling said sales, and declaring the property to belong to the community; that it be estimated at cash prices, and that after deducting the amount of debts paid by the husband, since the death of the wife, from the value of the succession property, that the remainder be equally divided, between the husband and the heirs of the deceased wife, who are the present defendants. On making the valuation and estimation of the property and debts aforesaid, it was ascertained, that the property amounted to eleven thousand nine hundred and forty-two dollars, and the debts paid by the husband, to sixteen thousand and eighty-six dollars. The heirs of the wife, or a portion of them, refused to carry this decree into effect. The object of the present suit is to compel them. The district judge decided, he was without jurisdiction, with respect to the first suit, so far as the rights of minors, the dissolution, partition and settlement of the community was concerned, which belonged of right, to the Court of Probates; and refused to carry said decree into execution, except so far as to confirm the rescission of the sales alluded to, and sent both that, and the present suit, to the Court of Probates. From this decision the plaintiff appealed. *See the case decided in* 3 *Martin, N. S.* 37.

On the return of the case to the District Court, the defendants offered evidence, to prove, that after the death of the wife, the husband continued in possession of the plantation and slaves, and made large and valuable crops with the said slaves, which were community property, and by this means, was enabled to pay off a large amount of debts, with which he charged the community, and which exceeded in amount, the value of the community, at the death of the wife. This evidence was objected to, and rejected by the court. Evidence offered by the defendant, to show the value of the community property, at the death of the wife, was also rejected by the court, and bills of exception taken.

The defendants' counsel offered to prove, by witnesses, that it was the established usage and custom, in the county of Attakapas, and in the province of Louisiana, and also in the state of Louisiana, to continue the community of goods and property, which had existed between the husband and wife, after the death of one of the parties, with the heirs of the deceased, and the surviving partner, until the making of the *inventory*, &c.; and that all the property of the community, existing at the time of the inventory, has always been considered, and as properly belonging to the community, to be equally divided between the surviving partner, and the heirs of the deceased one, and that this custom has always been observed; and the counsel of the defendants, also offered to prove, that the *Fuero Real* of Spain, was still in force in this country, all which testimony was objected to, on the grounds, that it was proving by witnessess, a custom contrary to the general laws of the state, and proving a general law. It was rejected by the court, and a bill of exceptions taken.

The defendants' counsel then offered the records of the county of Attakapas, in the parish judge's office, to prove this custom, commencing with the year 1774, and up to 1824, near the time of the adoption of the Louisiana Code, which was objected to, as proving a custom contrary to the general law of the state. The objection being sustained, the defendants' counsel took his bill of exceptions.

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The plaintiff had judgment, establishing the payments made by him, on account of the community, to the amount of fourteen thousand one hundred and nineteen dollars, which is adjudged to be an offsett to all the defendants' claims, and the plaintiff discharged from all further liability, for any property of the succession. The defendants appealed.

This cause was argued at the September term, 1827, at Opelousas, by *Mr. Brownson* for the plaintiff, and by *Mr. Simon* for the defendants. The opinion of the court, was made out at New-Orleans, sent up and entered of record, as of the September term, 1827.

Porter, J., delivered the opinion of the court.

This case grew out of an action, which was originally brought to ascertain, and settle the claims of the heirs of the late wife of the present plaintiff, to the property held in community, at the dissolution of the marriage, and to annul and set aside certain conveyances, which the plaintiff had made, of all the real and personal estate. He and those to whom he had sold, pleaded to the action, and after the cause stood at issue for some time, a decree was entered up by *consent*, declaring the deeds of sale null and void, directing an inventory and estimation of the property to be made; that the plaintiff should take the whole of the estate, at the price of the appraisement, and that after deducting the debts due by the community, he should pay the heirs of the wife their shares, at certain periods of time, therein mentioned.

The petition in this case, sets forth these facts, and avers, that an inventory had been made by the parish judge; that the whole estate amounted to eleven thousand nine hundred and forty-two dollars; that he has paid debts to a greater amount, viz: sixteen thousand and eighty-six dollars, and that the defendants refuse to ratify these proceedings, or carry them into effect. It concludes with a prayer, that they may be cited, that the whole of the proceedings may be homologated, and that the plaintiff may be discharged from all further responsibility.

The answer contains a general denial; that the parties to this, and the former suit, were minors and married women, and that no legal consent could be given by them, to such a decree as that set forth in the petition; that the conduct of the plaintiff was fraudulent, in delaying the inventory and appraisement, until property had greatly fallen in price; that the sum, which the plaintiff now avers he had paid of community debts, exceeded by more than four thousand dollars, the amount stated in the answer, filed by him in the first suit; and lastly, that after the death of his wife, he had acquired property which must enter into the community.

On the trial, the defendants offered evidence to prove, that after the death of their ancestor, the plaintiff had made large crops with the slaves, which were common property. This was rejected. They then offered to prove by parole, and by the record books of the Court of Probates of Attakapas, that it was the usage and custom of that county, and of the state of Louisiana, to consider the community as existing, until an inventory was made; that the *Fuero Real* of the kingdom of Spain, was in force, where the succession was opened. This evidence was also rejected by the court, to which the defendants excepted.

Customs result from a long series of actions constantly repeated, which by such repetition and by uninterrupted acquiescence, acquire the force of a tacit and common consent.

Customs, according to our Civil Code, result from a long series of actions, constantly repeated, which have by such repetition, and by uninterrupted acquiescence, acquired the force of a tacit and common consent. *La. Code, art.* 3.

The particular custom that *the comminity of property continues* after the death of one of the partners *until inventory is made*, is required to be proved by other partitions and divisions, that may have been made in the same place, and that it has prevailed without interruption.

The particular custom, on which the defendants relied in this instance, is required to be proved by other partitions and divisions, that may have been made in the same place, and that it has prevailed without interruption. *Febrero, p.* 2, *lib.* 1, *cap.* 4, § 4, *No.* 91. 3 *Martin*, 120. The recognition of customs, by our Code, necessarily admitted proof, other than that required to establish laws. The custom which the defendants attempted to prove, was not as plaintiff objects, contrary to the general law of the land, but an exception to the ordinary rules, which regulate partnerships. If the proof of customs could be rejected, because it established something

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different from the law, no custom could be proved, for if it were not different, it would make a part of the law.

But the court, in our opinion, acted correctly, in rejecting parole evidence of this custom, first, because the law directs, it shall be proved in another manner; and second, because parole evidence is not the best of matters, which the law required to be executed in writing. There was no legal ground, for rejecting the evidence of the books of the parish judge; it was precisely that species of proof, which the law demands, in relation to this custom, and the cause must be remanded, to give the party an opportunity of producing it.

Parole evidence is inadmissible to prove the customs of a country.

The books and records in the parish judge's office are legal and the proper evidence to prove a particular custom in relation to the continuation of the community after the death of one of the partners until inventory is made.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; that the cause be remanded for a new trial, with directions to the judge *a quo*, not to reject the record books of the parish of St. Martin, to prove that the *Fuero Real* was in force there; and it is further ordered, adjudged and decreed, that the appellee pay the costs of this appeal.

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APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Evidence consisting of extracts from the *procès verbal*, of commandants and parish judges in Attakapas, for a long series of years, in which the phrase "*afin de faire cesser la communauté*" is used in the caption to inventories, with other phrases of similar import, *is insufficient* to prove the existence of a *custom in such place*, that a community of acquests and gains continued between the surviving husband and the heirs of his deceased wife, until inventory is made.

When there is no evidence to satisfy the court, that any succession has been settled and partaken, in conformity with an alleged or supposed *custom* of a place, recognising the continuance of the community after the marriage is dissolved, *until inventory is taken;* and nothing like a course of judicial acts recognising such a custom is shown, it will not be considered as proved to exist.

A community of acquests and gains as such, ceases to exist at the moment of the death of one of the partners, with all the legal effects resulting from it. Each party is seized of one undivided half of the property composing the mass; and the surviving party cannot alienate the share not belonging to him.

If the survivor of a community of acquests and gains, continues to administer it without provoking a partition and is tacitly permitted to enjoy the common estate, he will be considered, except in cases where he may have a legal usufruct, as intermeddling, and his responsibilities will be those of a *negotiorum gestor.*

A judgment rendered by a court of competent jurisdiction, between parties legally before it, cannot be questioned indirectly and collaterally.

Minors are bound by the judgments of courts of competent jurisdiction, when they come before them properly represented, in the same manner as other persons.

The *Fuero Real* was not in force in Louisiana in 1816.

While a judgment remains in force and unappealed from, the rights of the parties are concluded by it, leaving to those under age their legal recourse.

Property purchased by the husband after the dissolution of the community by the death of his wife, becomes his *sole* property; but he is accountable for one-half of the net revenues derived from the common property after the death of his wife, and up to the time of making the inventory.

This case was remanded for a new trial at the September term of this court, held at Opelousas, in 1827. See *preceding case, ante* 211.

On its return to the District Court the defendants were permitted to prove by the records of the parish judge's office, that according to the customs of the county of Attakapas, a community of property continued after the death of one of the partners between the survivor and the heirs of the deceased partner until an inventory is made.

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The district judge decided "that the defendants having proved that the *Fuero Real* of Spain was in force in this state at the time of the death of the wife of the plaintiff, in 1816, that the community of goods and property and acquests and gains which formerly existed between the parties, *continued* after the death of the wife, to the 15th November, 1820, the time of making the inventory." He then went on to annul the decree rendered in the first suit, which directed an estimation and deduction of all the debts paid by the husband, from the community property, after the death of the wife, and before taking the inventory, before a partition of the community was to be made. Judgment was then rendered in favor of the defendants for one-half of the community as estimated in the inventory taken in 1820, or for half the sum of eleven thousand nine hundred and forty two dollars, to be satisfied out of the property of the community that existed in the possession of the husband at the death of his wife. From this judgment the plaintiff appealed.

Brownson for the plaintiff contended, that the decree rendered between these parties must be enforced, as nearly all of the heirs of Madame Broussard were majors and married women at the time it was rendered by consent.

2. It will also appear from the estimate of the community, as it existed at the wife's death, and the amount of debts since paid on its account, that there was not, and is not now in fact any property or portion of the community, which the heirs can claim.

3. But suppose there should be found any estate to be divided between these claimants, and supposing that the former judgment should be found injurious to the present defendants, I contend that this court can only make restitution to the minors, and not to the majors and married women, who were legally represented at the rendering of the decree.

4. Minors it is admitted are privileged to demand restitution, even against a judgment under the Spanish law, but they must show that they have been injured. *Partida* 6, *tit.* 19, *law* 2.

5. But can the restitution in favor of the minors, benefit the majors? Their interests are not indivisible. The law itself divides their interests, so that each is entitled to his virile portion of the property, &c.

6. It is argued that the community of acquests and gains, continued after the dissolution of the marriage, until the taking of the inventory. If so, then all the property of which it was composed, was included in the inventory. On the subject of the continuation of the community, after the death of one of the parties, the court is referred to *Febrero, part* 2, *lib.* 1, *chap.* 4, § 4, *from No.* 86 *to* 96.

7. The plaintiff denies the existence of the *Fuero Real* of Spain in Louisiana, or any such customs in the county of Attakapas, as those contended for by the defendants' counsel.

Simon for the defendants.

1. This suit is brought to carry into effect a certain judgment of the District Court, unappealed from, which judgment was rendered by consent between the parties. That consent I contend, was given in error. Three of the plaintiffs in that suit, and who are defendants in this, were minors at the time the judgment was rendered. Judgment in the present case, was rendered in favor of the defendants generally, and the plaintiff appealed.

2. The defendants plead restitution against the first judgment, which plea should have effect, at least in favor of the minors. Judgment by consent, under such circumstances, cannot stand. *Partidas, Moreau and Carlton edition, vol.* 1, *p.* 317, *laws* 1, 2, 3. *Vol.* 2, *p.* 1153, *law* 3.

3. The injury resulted in this case, in not setting up the proper defence for the heirs, and in letting judgment go against the legal rights of the parties. We now take the ground that the community *continued to exist between* the surviving husband and the heirs of his wife, until the making of the inventory; that all the fruits arising from the property, since the death of the wife, up to the time of the inventory, belong to the community, and ought to have been accounted for by the husband, to the community. If this position be

true, its effect was disregarded at the rendition of the judgment, which considered the community dissolved by the death of the wife. In this respect, the judgment, as far as regards the minors, is not binding. They at least are entitled to restitution.

4. The community continues between the surviving partners, and the heirs of the deceased one, until an inventory is made. 4 *Febrero ad. book* 1, *chap.* 4, § 4, *Nos.* 86, 87 *and* 88, *p.* 261. *Ibid, vol.* 3, *chap.* 9, § 1, *No.* 12, *p.* 181.

5. According to the custom of Orleans, if no inventory is made, the community continues with the collateral heirs. *Pothier's Communauté, vol.* 2, *p.* 229, § 792, 793, *p.* 260, *No.* 808. 3 *Martin*, 120.

6. In this case it is proven, that it was always customary in the county of Attakapas, to make settlements of the community on the basis of its continuance, up to the time of taking the inventory. The acts and records from the parish judge's office in St. Martin, embracing a long series of dates, and which are in evidence, show the existence of this custom; and that the *Fuero Real* of Spain existed, and was in force in Attakapas, at the time of the death of plaintiff's wife.

7. All the profits that have been made by the plaintiff, since the death of his wife, up to making the inventory, and with which profits he has paid the debts of the community, ought to have heen partaken between the parties; that is, the plaintiff should not be allowed any credit for the payment of those debts, which were extinguished by said profits.

8. The District Court has rendered a judgment in favor of the defendants, for their half of the inventory, without allowing any credit for the debts paid with the profits. We contend, that all the defendants are entitled to that half, and at all events, that the three minors are entitled to their portion, which would be a fourth of the amount of the inventory.

9. In relation to the married women, who were interested in the first suit, and among the defendants in this; and whose husbands in that consented to the judgment, I contend that the judgment is not binding on them, and that they with the minors, are entitled to restitution.

Brownson in reply, denied that there was any evidence of any debts having been paid by the fruits and profits of the late community.

2. The debts were chiefly paid by contracting new debts on the part of the plaintiff. If evidence to this point had been taken, it would have shown that the plaintiff, during the pendency of this suit, had failed in consequence of them.

Bullard J., delivered the opinion of the court.

This case was before the court, at a former term; the judgment first rendered, was reversed, and the case remanded, in order to enable the parties, to exhibit certain evidence, of the existence of a custom. On the new trial, written evidence was produced, consisting of documents from the archives of the parish of St. Martin, some of ancient and some of recent date, which satisfied the judge *a quo*, that the custom, of considering the community as continuing, after the death of one of the parties, until an inventory was made, was in existence in Attakapas, and that the *Fuero Real* was in force there, at the death of Madame Broussard, as late as the year 1816.

This court held, at that time, that the particular custom relied on, could only be proved by other partitions and divisions, which may have been made in the same place, and that it prevailed without interruption, upon the authority of *Febrero, p. 2, lib. 1, chap. 4, § 4, No. 91.* and *3 Martin, 120.*

The evidence offered on the trial, and which is annexed to the record, consists of numerous inventories or extracts, from *procés verbaux*, by several successive commandants, on proceeding to take inventories, in which they make use of such expressions as the following: that they had proceeded to make an inventory with appraisement, &c. *"afin de faire cesser la communauté,"* &c., or of similar import. There is no evidence to satisfy us, that any succession has been settled and partaken, in conformity with such supposed custom. Nothing like a course of judicial acts, recognising such a custom, is shown. The expressions embodied in the various inventories before us, amount to nothing more, in our opinion,

Evidence consisting of extracts from the *procés verbal*, of commandants and parish judges in Attakapas for a long series of years, in which the phrase *"a fin de faire cesser la communauté"* is used in the caption to inventories, with other phrases of similar import, *is insufficient* to prove the existence of a *custom in such place*, that a community of acquests and gains continued between the surviving husband and the heirs of his deceased wife, until inventory is made.

When there is no evidence to satisfy the court that any succession has been settled and partaken in conformity with an alleged or supposed *custom* of a place, recognising the continuance of the community after the marriage is dissolved, *until inventory is taken*; and nothing

than the usual style of notaries, which add nothing to the force and effect of the act. An inventory without such enunciation of the purpose for which it was made, would not be less an inventory.

That a community of acquests and gains, as such, continues after the death of one of the partners, with all the legal effects resulting from such a relation, with authority in the husband, if he should survive, to be still regarded as the head of the community, with power to bind the common property by new contracts, and to alienate it without restraint, is a proposition so repugnant to all our notions of a community, and so subversive of first principles, that it cannot be for a moment admitted. On the death of one of the spouses, the community, in a legal sense of the word, is unquestionably terminated. Each party is seized of one undivided half of the property, composing the mass, and the surviving party cannot validly alienate the share, not belonging to him. If the survivor continues to administer, without making a partition, and is tacitly permitted to enjoy the common estate, he will be considered, except in cases where he may have a legal usufruct, as intermeddling, and his responsibilities will be those of a *negotiorum gestor*.

The object of the present suit, is to compel the defendants, to come to a final liquidation and settlement of the community, formerly existing between Michel Broussard and his late wife, according to a decree, rendered by consent of all parties concerned, in 1820. The defendants in this case, who were plaintiffs in the first suit, seek to avoid the effect of that judgment, on the allegation, that it was rendered by consent, that some of them were minors at the time, and some married women, and that they were injured by said judgment, and are entitled now to restitution.

The action upon which the judgment was rendered, in 1820, was prosecuted by the present defendants, against Michel Broussard, and other persons, to whom he had conveyed, during the life-time of his wife, certain property, belonging to the existing community of acquests and gains. The principal object of that suit appears to have been, to

like a course of judicial acts recognising such a custom is shown, it will not be considered as proved to exist.

A community of acquests and gains, as such, ceases to exist at the moment of the death of one of the partners, with all the legal effects resulting from it. Each party is seized of one undivided half of the property composing the mass; and the surviving party cannot alienate the share not belonging to him.

If the survivor of a community of acquests and gains, continues to administer it without provoking a partition, and is tacitly permitted to enjoy the common estate, he will be considered, except in cases where he may have a legal usufruct, as intermeddling, and his responsibilities will be those of a *negotiorum gestor*.

annul that alienation, as made in fraud of his wife. The purchasers, who were parties, pleaded among other things, that the right of action was prescribed; that a year had elapsed since the sale, and that in cases of alleged fraud, the revocatory action could not be maintained, after the expiration of one year. The judgment was finally entered by consent, annulling the alienation, restoring the property to the community, and permitting the surviving husband to retain it as his own, on certain conditions.

If we take the whole judgment together, it is not easy to comprehend, how the present defendants have been aggrieved by it. Without that judgment, the whole property would yet belong to Isidore Broussard, or Landry, to whom it was conveyed, before the death of Madame Broussard. It is said, that the consent of the husband, and of the tutors, amounted to an alienation of the property of the wife and minors. But it must not be overlooked, at the same time, that the same consent tended to acquire the same property, which without it, may have been irrevocably lost to them.

The decree rendered in the present case, sustains to a certain extent, the exception of the defendants, and proceeds to set aside the first judgment, as founded in error of law, and prejudicial to the minors and married women, and condemns the plaintiff to pay about six thousand dollars, the estimated value of the property in the inventory.

A judgment rendered by a court of competent jurisdiction between parties legally before it, cannot be questioned indirectly and collaterally.

It has been contended by the counsel for the appellant, that the first decree rendered by consent, if objectionable, was not absolutely null, but merely erroneous, and can only be avoided by action of nullity, or by appeal.

This court has held, that a judgment rendered by a court of competent jurisdiction, between parties legally before it, cannot be questioned indirectly and collatarally, and in a recent case, that minors properly represented, are equally bound; and the same doctrine was recognised in the case of *Martin* vs. *Martin's heirs*. 5 *Martin, N. S.* 165.

Minors are bound by the judgments of courts of competent jurisdiction, when they come before them properly represented, in the same manner as other persons.

We are therefore of opinion, that the court erred, in declaring that the *Fuero Real* was in force in Louisiana, at

The *Fuero Real* was not in force in Louisiana in 1816.

the death of Madame Broussard, and in setting aside the judgment heretofore rendered, and yet remaining unreversed. While that judgment remains in full force, it ought to regulate the rights of their parties in the premises, leaving to those who were not of age at the time, their legal recourse.

While a judgment remains in force and unappealed from, the rights of the parties are concluded by it, leaving to those under age their legal recourse.

Before any final settlement of the community can be made, it is necessary to examine the substance and extent of that decree. It begins by declaring, that the property which had been sold by Broussard to Isidore Broussard, and by the latter to Landry, belonged in full right and *bonâ fide*, to the parties jointly, the same, together with its natural fruits and increase, being a community between said Michel and the heirs and representatives of his wife. It then proceeds to decree, that all the property mentioned in the deeds, shall be partaken and divided between the parties, the heirs taking their share in money, at certain times of credit, and the defendant retaining the property, at an appraisement to be made afterwards; and the sums coming to the heirs, being one-half of that estimation, after deducting the amount of debts due by the community, and which the defendant may have paid, after the death of his wife. It is silent as to the revenues derived from the property, from January 25th, 1816, up to the time of the inventory.

Property purchased by the husband after the dissolution of the community by the death of his wife, becomes his *sole* property; but he is accountable for one-half of the net revenues derived from the common property after the death of his wife, and up to the time of making the inventory.

It is contended by the defendants, in their answer, that the property acquired by the plaintiff, after the death of his wife, belongs to the community. We are of opinion, that it forms the sole property of the plaintiff, but that he is accountable for one-half the net revenues, derived from the common property, after the death of his wife, and up to the time the inventory was made, in November, 1820. At that period, we consider his obligation to account for the revenues, to have ceased, because he was authorised to consider the whole property as his own, on paying interest, according to the judgment.

According to this view of the rights of the parties, under the existing judgment, we are of opinion, that the final settlement and liquidation of the community, ought to be effected as follows: first, all the property mentioned in the

inventory, in the possession of the plaintiff, at the price therein estimated; second, crediting the plaintiff for all debts contracted before the death of his wife, and since paid by him, and thirdly, charging him with one-half of the net revenues, which the defendants may prove to be derived from the use of the common property, from the 25th January, 1816, till the 15th November, 1820.

As the judgment in question, related only to certain specific property, and it does not appear certain, that it was the only property belonging to the community, at the death of Madame Broussard, we are of opinion, that the defendants are not precluded from showing the existence of other joint property at that time, and that, in its partition, the defendants are not bound by the said judgment.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed; and it is further ordered, adjudged and decreed, that the parties proceed before the parish judge, of the parish of St. Martin, to the final settlement of the community, lately existing between Michel Broussard and Anastasie his wife, according to the principles expressed in this opinion, and that the defendants pay the costs of the appeal.

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APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARY.

In the construction and interpretation of wills, the intention of the testator must be sought in the *words he has used* in the will, and not *aliunde*.

Constructions and interpretations of wills, are not to be resorted to for the discovery of the testator's intention, when he has used none but plain unequivocal expressions.

A testator must be presumed to know that his own property alone can be the subject of his disposition.

So where a community of property exists, and the testator in his olographic will declares he wishes "*the rest of his property*, (after making legacies) both real and personal, divided as follows: *One-half to his wife, and the other half to his brother's children*," &c: *Held*, that the wife first takes half the community, and one-half of the other half, after deducting debts and legacies.

This is an action of partition. The plaintiff as surviving wife of the late Joseph Theall, instituted her suit in the Probate Court, for the parish of St. Mary, against the dative testamentary executor, and the testamentary heirs and legatees of her deceased husband, for a partition of his succession, according to the provisions of his olographic will, duly admitted to probate. The will was dated the 9th February, 1832, and the testator died during that year. After making several specific legacies, on particular titles, to his collateral relations, the testator proceeds with the following bequest. "I give my wife Nancy Theall, all my household and kitchen furniture, with the cattle and hogs that are remaining. The rest of my property both real and personal, I wish divided in the following manner, that is to say: *One-half of all to my wife* Nancy Theall. The other half to my brother's children," &c.

In pursuance of the above clause in the will, the plaintiff prays to have decreed to her one-half of the estate of her late husband, comprising the community of acquests and gains; the specific legacies, on particular title, bequeathed to her, and one-half of all the residue of the said succession,

after paying the specific legacies, on particular titles, contained in the will.

The defendants alleged that it was the intention of the testator to dispose of the whole of the property which he possessed, as well his hereditary property, as that held in community with the plaintiff at the time of his death, and that the plaintiff was only entitled to a moiety of the whole estate, after paying the legacies, &c. The evidence consisted of the will and the inventory of the succession. It also appeared that a community of property existed between the spouses at the time of making the will, and at the death of the husband. The wife (now plaintiff) claims one-half of the succession by the operation of law; and one moiety of the other half (after paying the legacies) under the will.

The probate judge decided that it was the intention of the testator, to dispose of all the property (both community and hereditary) of which he should die possessed; and that the dispositions contained in the will in favor of the wife, were intended to be in lieu of all her claims against her husband's succession, and on accepting the advantages conferred by the will, she is bound to receive them in full satisfaction, and discharge of all her legal claims. The plaintiff appealed from this decree.

Lewis and Bowen for the plaintiff.

1. The will must be construed so as to give it effect if possible. *La. Code, art.* 1706. 6 *Toullier, p.* 355 *n.* 321.

2. The words of the will must be understood in their usual sense, or common acceptation. *La. Code, art.* 1705.

3 Meaning and effect are to be given to *all* the words of a will *according to their legal acceptation.* 1 *La. Reports,* 161–2, *and* 2 *La. Reports,* 509.

4. The words of the will must have their full effect, when there is no ambiguity in their meaning, and even where the testator is known to have habitually used a word in an improper sense, still the usual sense of the word will have its effect. 6 *Toullier,* 342, *n.* 308, *p.* 343, *n.* 309, *p.* 345, *n.* 311 *and n.* 312, *and* 313, *and p.* 350.

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5. The words "*my property*," in the will cannot apply to the wife's half of the community, because,

1. One half of the community property, was *hers, independent of the testator's will*, and in it she had a *vested right* at the time the will is dated, as well as at his death. 4 *La. Reports*, 188 *and seq. Nov. Recop. lib.* 10 *tit.* 4, *l.* 1.

2. If a husband bequeath *any thing* to his wife, it shall not be taken out of her *gananciales*, but she shall have *it besides them. Nov. Recop. lib.* 10, *tit.* 4, *l.* 8.

3. To apply them in any other way, would be to make the testator show an intention to defraud his wife, under the specious pretence of giving her a legacy; and this would be contrary to every presumption of law which ever infers an honest rather than a dishonest intent, unless the latter be palpable.

Brownson for defendants.

1. Contended that it was the intention of the testator to dipose by *will*, of the *whole* of the property of which he should die possessed. According to this construction, the widow would be entitled only to *one-half* of the whole estate, after paying the legacies, debts, &c.

2. The testator being at the head of the community, evidently *intended* by the expression, "*the rest of my property*," to include all the estate which existed between him and his wife, at his death, and which he intended should be so divided as to give one-half of the net amount, after the debts and specific legacies were paid, to his wife, and the other half to be divided among his collateral relations. Any other construction would be in violation of the intentions of the testator.

Garland on the same side, argued to show that the construction of the will, contended for by the plaintiff, was contrary to the evident intentions of the testator. In construing wills, the universal rule is, that the *intentions* of the testator must govern.

2. This was an olographic will, written by the testator himself a plain unlettered man, whose expressions taken in connexion with the circumstances around him, ought to be

construed with reference to what he intended and did in effect say, than to strict grammatical arrangement.

Martin, J., delivered the opinion of the court.

The only question which this case presents, depends on the meaning of the last clause of the will of Joseph Theall, the plaintiff's late husband. After making several specific legacies, one of which is in favor of the plaintiff, of the household and kitchen furniture of the testator, and some cattle and hogs, the will concludes by the following clause: "The rest of my property, both real and personal, I wish to be divided in the following manner: that is to say, one-half of all to my wife; the other half to my brother's children: that is to say, one-half to James Theall's daughter Nancy, the other half to John Theall's children."

On the application of the wife for a partition, the Court of Probates expressed its opinion, that it was the intention of the testator, in this clause, to make a disposition of all the property, of which he should die possessed, as well that which he held in community with his wife, as that which composed his hereditary and proper effects; and that the disposition in the will in favor of the wife, was intended to be in lieu of her claim on, or against his succession; and that in accepting the advantages conferred on her by the will, she was bound to receive them in full payment, satisfaction and discharge of all her legal claims. The partition was directed to take place according to the opinion thus expressed; and the plaintiff appealed.

The counsel for the appellee has contended that the will must be construed according to the evident intention of the testator, who must be believed by the expression "*all my property, real and personal,*" to have included the property which he had acquired by his industry and economy, although the laws of the country gave to his wife one-half of the acquests and gains made during marriage. That he does not use the words "*I give and bequeath,*" in the clause under consideration, but merely expresses the manner in which it is his intention a division should be made. And it is not to be believed, that while the law gave to his wife, one-half of the profits of his industry during the marriage, he could be tempt-

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In the construction and interpretation of wills, the intention of the testator must be sought in the *words he has used* in the will, and not *aliunde*.

Constructions and interpretations of wills are not to be resorted to, for the discovery of the testator's intention, when he has used none but plain unequivocal expressions.

A testator must be presumed to know that his own property alone can be the subject of his disposition.

So where a community of property exists, and the testator in his olographic will declares, he wishes "*the rest of his property* (after making legacies,) both real and personal, divided as follows: *One half to his wife*, and the other half to his *brother's children*" &c. *Held*, that the wife first takes half the community, and one half of the other half, after deducting debts and legacies.

ed to rob his own relations, by willing away from them one-half of the other half.

There cannot be a truer position, than that under which courts are directed in the construction or interpretation of wills, to be guided by the intention of the testator. This intention must be sought in the words, which he has used in his will. It is not to be sought *aliunde*.

But constructions and interpretations, are not to be resorted to for the discovery of the testator's intention, when he has used none but plain unequivocal expressions. Candles are not to be lighted, when the sun shines brightly.

A testator must be presumed to know, tha this own property only, can be the subject of his disposition, and that he cannot dispose of the property of others.

It is neither extraordinary, uncommon or surprising, that a man should give one-half of his property to his wife, when he bestows the other half on his nephews and nieces.

If a declaration of a testator, that he wishes his estate to be divided between his wife and his collateral relations, is evidence of his intention, that the latter should enjoy the portion coming to them; it is difficult to comprehend, why the declaration should be rejected, when presented as evidence of the liberality of the testator towards his wife.

The bequests appear to us, absolute and unconditional, and we are unable to concur in the opinion, expressed by the Court of Probates, that it is clogged with the condition, that the wife should renounce her legal rights, not resulting from the will.

The wife is, in our opinion, entitled to one-half of the amount of the property of the community, after its debts are deducted. The other half, added to the husbands' private property constitutes his estate. The entire amount of this estate, after his private debts are paid, is subject to the disposition he has made of it, in his will. One-half of the specific legacy, in favor of the plaintiff, and the whole of the other specific legacies are to be deducted, the balance forms the residue, which is to be divided in two equal parts, one of which belongs to the wife, and the other to be divided,

one-half to Nancy, the daughter of James Theall, and the remaining half to be divided among the children of John Theall.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be annulled and reversed; and proceeding to give such judgment, as in our opinion, ought to have been rendered below, it is ordered, adjudged and decreed, that the partition of the estate of Joseph Theall deceased, be made according to the opinion we have expressed; and that the case, for that purpose, be remanded to the Court of Probates; the appellees paying costs in this court.

RASPILLIER *vs.* BROWNSON.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

An intervenor in a suit commenced by attachment between the original parties, although he succeeds in obtaining judgment, cannot proceed on the attachment bond against the surety for any supposed damages, because he is no party thereto.

There is no privity of contract between the intervenor in a suit, already begun by attachment, and the surety in the attachment bond, and he cannot avail himself of the penalty in the bond.

The plaintiff took a rule on the defendant, to show cause why he should not be made liable as surety in an attachment bond. The facts show, that one Miles, in Kentucky, sued out an attachment against William L. Brent, then residing in Attakapas, in a suit on a promissory note of the latter, for two thousand three hundred and fifty dollars, given for the price of slaves. Mr. Brownson was the surety in the attachment bond executed by the plaintiff Miles. While this suit was

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pending, Raspillier, the present plaintiff, intervened and claimed the amount of the note sued on, as having become the purchaser thereof, and entitled to receive the proceeds.

After several years litigation, he finally obtained judgment for the net amount of the note, *without interest.* See *case of Miles* vs. *Oden et als.* 8, *Martin, N. S.* 214.

Raspillier now contends that he has sustained damages to the amount of his costs and interest on Brent's note, and that the attachment bond in the suit of Miles *vs.* Oden et als., in which Brent was a principal defendant, enured to his benefit. He seeks to fix this liability on the defendant, as surety in said bond.

Mr. Brownson appeared, and showed for cause that he could not be rendered liable on the attachment bond in this way; that if liable at all, he could only be made so by a civil suit in the ordinary way of petition and answer. The rule was discharged and the plaintiff appealed.

Brownson in propria persona, submitted the case without argument, no counsel appearing for the plaintiff.

An intervenor in a suit commenced by attachment between the original parties, although he succeeds in obtaining judgment, cannot proceed on the attachment bond against the surety for any supposed damages, because he is no party thereto.

There is no privity of contract between the intervenor in a suit, already begun by attachment, and the surety in the attachment bond, and he cannot avail himself of the penalty in the bond.

Bullard J., delivered the opinion of the court.

The appellant, C. Raspillier, having intervened in a suit commenced by attachment by Miles, against Brent, in which the present appellee was attorney and security on the attachment bond, and judgment having been rendered in his favor, for the amount claimed by him except interest, took a rule on the appellee to show cause why judgment should not be entered against him, for the amount of damages, sustained by him, as the real party in interest.

To this rule the appellee showed for cause, that he was not a party to the suit, and that if he was liable for damages, as surety on the bond, they could be recovered only by regular suit. The rule was discharged, and the complainant appealed.

We are of opinion that the court did not err in discharging the rule. Besides the obvious objection that Raspillier was not a party to the bond, and that there existed no privity of contract between him and the appellee, it appears that final

judgment had already been rendered in the case, as to the principal demand, and it was too late to engraft upon it any new incidental question. Nothing remained to be done but to execute the judgment rendered on the appeal.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

PORTER *vs.* CURRY ET ALS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

The captain of a steam-boat, owned by several persons, (including the captain) has authority to contract for freight, to be carried according to the usual trade of the boat; and all the owners are bound by such contract, even without their assent given thereto.

The captain, as agent of a steam-boat, may make contracts to take effect *in future*, to carry freight according to the usual course of trade of said boat.

Where the captain of a steam-boat, contracts to carry certain freight, at a future day, between the well known *termini* of his voyage, and fails or violates such contract, the owners of the boat are liable in damages, for all the loss sustained by the party, with whom the contract is made.

The measure of damages, and just criterion of loss to the owner, is the value of his property, at the place of destination, after deducting freight.

The plaintiff alleges, that through his agents in New-Orleans, in February, 1829, he employed captain R. W. Curry, commander and part owner of the steam-boat Attakapas, then running in the trade, from St. Martinville to New-Orleans, to carry five thousand seven hundred gallons of molasses, worth one thousand four hundred and twenty-five dollars, from the

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sugar plantation of Messrs. Dubuclet & Benoit, on the Bayou Teche, to New-Orleans; that to carry the said contract into effect, the plaintiff, by his agents, Fisher, Burke & Watson, in New-Orleans, shipped one hundred and sixty empty barrels, to be filled up with said molasses, at the said plantation, and shipped and returned from thence to New-Orleans, for which a freight of one dollar and twenty-five cents per barrel, was to be paid. The plaintiff further charges, that the said captain Curry failed to deliver more than sixty of the empty barrels, until long after the time agreed on; and that he failed to receive the said barrels, when filled up, and to return them according to agreement, as specified in a bill of lading for the empty barrels, and wholly failed and refused to receive the said molasses, although repeatedly requested to do so; and that the molasses remained two months, after they were to have been shipped, and until the close of the navigation, in July, 1829, when by fermentation and leakage, the molasses, in consequence of the failure of captain Curry to perform his contract, were wholly lost, except about fifty barrels, which were sent by another conveyance. He estimates the loss sustained, in consequence of the non-fulfilment of said contract, at one thousand six hundred dollars, for which he avers the captain and owners are liable, and prays judgment accordingly.

The defendants plead a general denial; that they were not bound by the contract, which appeared to be made by one B. Lafosse, as clerk of the steam-boat, who signed the bill of lading; that he had no authority to sign such an instrument, and that the contract alleged to be made, in plaintiff's petition, is entirely out of the usual course of business, which the said clerk was engaged to perform; they aver, that if they were bound, they have fully complied with their obligation; that they delivered the one hundred and sixty empty barrels as directed, which were never put in a situation to be returned by the steam-boat; so that the non-compliance with the contract, as alleged, was solely the fault of the plaintiff or his agents; that if all of said empty barrels were not delivered, it was owing to the danger of the

navigation, for which they are not responsible. They aver, that more than one year has elapsed, previous to instituting this suit, from the time of the contract; consequently the action is barred by the prescription of one year.

The plaintiff proved by several witnesses, the agreement to carry the molasses to New-Orleans, as alleged; that captain Curry, when he delivered the last lot of empty barrels, late in the season, from another steam-boat, (the Lady Lafayette) positively refused to receive the molasses, at the sugar plantation of Messrs. Dubuclet & Benoit; and that the molasses, with the exception of about fifty barrels, were wholly lost to the plaintiff; and the remaining fifty were shipped by another conveyance, but were so sour and leaky, as to be scarcely of any value.

The clerk of the steam-boat swears, he filled up and signed the bill of lading, according to the orders of captain Curry. It stipulates as follows:

"Shipped in good order, &c., by F. B. & W., on board the steam-boat Attakapas, whereof Curry is master, now lying in the port of New-Orleans, one hundred and sixty barrels, deliverable to Messrs. Dubuclet & Benoit, &c., to be filled up with molasses and returned to the shippers, &c., in like good order and condition, at the port of New-Orleans, (the dangers of the seas only excepted) unto the shippers, (F. B. & W.) or to their assigns, he or they paying freight for said barrels of molasses, at the rate of one dollar and twenty-five cents a barrel, &c. In witness whereof, the master or purser of the said vessel, hath affirmed to three bills lading, &c. Dated, New-Orleans, the 6th day of February, 1829." "B. Lafosse."

The defendants proved, that captain Curry stopped once for sixty or seventy barrels, which were not then ready.

Dubuclet proved, that he and Benoit sold the quantity of molasses stated, (five thousand seven hundred gallons) for thirteen horses, estimated at seven hundred and fifty dollars. It was also proved, that Fisher, Burke & Watson were the agents of plaintiff, and that the molasses were worth

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twenty-eight cents per gallon, in New-Orleans, at the time they were to be delivered.

The defendants' counsel moved the court to charge the jury, that the contract arising on the bill of lading, to carry property or freight, at *a future* day, made by the captain, was not binding on the owners of the boat, unless the captain was specially authorised to make such a contract, and that the power of making such a contract, is not included among the general powers possessed by captains to make contracts, which are binding upon the owners of vessels, &c. The judge refused, and charged the jury to the contrary of that requested. The defendants' counsel moved further, that the claim of the plaintiff, being for damages arising from the non-delivery of the barrels, &c., was barred by the prescription of one year; but the judge charged the jury, that the plaintiff's claim consisted of two branches, one for damages, for the non-delivery of the barrels received on board; and the other for damages, for not taking on board molasses, &c.; that as to the first claim, the plea of prescription had attached; but that as to the second, the court was of opinion, that said plea was not applicable. The defendants moved several other clauses, to be given in charge to the jury, to all of which, and those stated, the judge refused, and a bill of exceptions was taken to said charge.

The jury returned a verdict of nine hundred and eighty-two dollars fifteen cents, for the plaintiff, and after overruling a motion for anew trial, the district judge rendered judgment, in conformity to the verdict.

The defendants appealed.

Bowen and Lewis, for the plaintiff.

1. In this case, the defendants resist the claim for damages, on the ground that they were not put in delay before suit. This was not necessary, as a party may be *en demeure* by the *mere operation of law*, when the breach of the contract is declared by the law, equivalent to a default. *La. Code, art.* 1905, *No.* 3.

2. When the thing to be given, or done, by the contract, was of such a nature, that it could only be given or done,

within a certain time, which has elapsed, or under certain circumstances, which no longer exist, the debtor need not be put in delay, to entitle the creditor to damages. *La. Code, art.* 1927, *No.* 1.

3. *Merlin*, after laying down the rule, that a special demand is necessary to put a debtor *in delay*, unless the contract stipulates, that it shall be fulfilled in a fixed time, states as exceptions to the rule, cases in which the debtor is *en demeure*, without a subsequent demand: 1. Conventions which relate to commerce, as an agreement to carry merchandise to a fair, when the debtor is in delay, if he lets the time of the *fair* pass, without carrying the goods, &c. 2. Conventions which must be executed in a certain time, as repairing a wall, in danger of falling, &c. 3 *Merlin's Reports, Verbo Demeure, p.* 515. 2 *Ibid. Verbo Commintoire, p.* 491.

4. This is a commercial contract, and is not to be governed by the technical rules respecting *demeure*, contained in our Code, but by the commercial law. The *La. Code* contemplates the existence of a future Code of Commerce. See *art.* 2823.

5. Until a commercial code is adopted, commercial conventions must be determined by the existing commercial law, as recognised in the Code, in relation to bills of exchange and promissory notes. Other commercial contracts are decided by commercial law. *La. Code*, 1908. 3 *La. Reports*, 225.

6. The captain or master of the boat, who made this contract, had authority to make it, which was binding on the owners. The bill of lading was signed by the clerk, which is usual, and is done by the orders of the master. A bill of lading may be signed by the mate or clerk. *Jacobson's Sea Laws*, 94, 172.

7. The owners are responsible for every contract of the master, relative to the usual employment of the vessel. *Abbott on Shipping*, 152, 132, 133, 134.

8. But if a vessel be built for passengers only, the owners would not be liable for the contract of the captain, to take

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freight: or if it were employed in a particular trade, they would not be responsible for the contract of the master, to employ her in a different trade. *Abbott on Shipping*, 134.

9. This court has decided, that by the law of this state, owners are liable for contracts of freight or passage, entered into by the captain. 6 *La. Reports*, 319.

10. This contract was in part executed, by taking in and delivering the empty barrels, &c., and a voluntary execution involves a renunciation of all exceptions to it. 6 *La. Reports*, 530.

11. The prescription of one year, cannot be pleaded to this action, which is not a *quasi delit*, but a breach of contract; and the article 3501 of the *La. Code* relied on, applies only to *quasi delits*. 2 *La. Reports*, 429. 3 *Ibid.* 591.

12. If they claim it under that part of article 3501, which gives it as an exception to the action, for the delivery of goods or merchandise, we answer, that this part of the article has no relation to this action, which is brought, not to recover damages for the non-delivery of shipped articles, but for not receiving on board merchandise which was ready, and contracted to be shipped by defendants.

13. The court erred in charging the jury, that prescription barred that part of our claim, which demanded damages for the loss of the one hundred and twenty barrels, by which the jury only gave damages for the loss sustained on the molasses. The judgment ought to be amended, so as to allow the value of the barrels.

Simon & Brownson, for defendants.

1. The contract on which this suit is instituted, called "bill of lading," containing a stipulation to receive freight at a future period, is not obligatory on the owners, unless the captain was specially authorised to make such a contract; and that authorisation is not included in the general powers which captains have, in the conduct and administration of their crafts. *Jacobson's Sea Laws*, p. 94. *Abbott on Shipping*, p. 132, 133, 134.

2. The plaintiff's claim being for damages, resulting from the non-delivery of certain barrels put on board, the claim is prescribed by the prescription of one year. *La. Code, art.* 3501.

3. The stipulation contained in *the bill of lading*, to receive molasses on board the boat, at a future period, being in its nature a *synallagmatic* contract, it is not valid as such, having been signed only by one of the parties. *La. Code, art.* 1758, 1759, 1791, 1792, 1793, 1794. 6 *Toullier, Nos.* 18, 19. 6 *La. Reports*, 215.

4. The plaintiff, by said contract, was not bound to deliver the freight, and we had no means of compelling him to comply with that part of the contract. Could he not, notwithstanding said stipulation, have given his freight to another boat? What was to prevent him? A bill of lading is a receipt; something must be received to give force thereto. In this case nothing was received, it was only a promise *in futuro*; and it must be reciprocal, on one side to take, and on the other to deliver, otherwise there is no contract.

5. The plaintiff's claim being for damages, resulting from an imputed neglect, it is in the nature of a *quasi delit*, and therefore the claim is barred by the prescription of one year. *La. Code, art.* 3501, 2294, 2295, 2296. 6 *Toullier, No.* 232. *Code Nap. art.* 1382, 1383.

6. The damages claimed, arising from a passive violation of a contract, the defendants are not responsible, unless they have been put in delay, according to law. *La. Code, art.* 1905, 1906, 1925, 1926, 1927. 6 *Toullier, Nos.* 238, 239, 240, 241, 244, 254.

7. In case the jury were of opinion, that damages are due, we contend, that there being no fraud imputed to the defendants, the damages ought to be the value of the molasses, at the place where it was purchased, and not at the place where it was to be delivered. *La. Code, art.* 1928. 6 *Toullier, No.* 289.

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The captain of a steam-boat, owned by several persons, (including the captain,) has authority to contract for freight, to be carried according to the usual trade of the boat; and all the owners are bound by such contract, even without their assent given thereto.

The captain as agent of a steam-boat, may make contracts to take effect *in futuro*, to carry freight according to the usual course of trade of said boat.

Where the captain of a steam-boat contracts to carry certain freight at a future day, between the well known *termini* of his voyage, and fails or violates such contract, the owners of the boat are liable in damages for all the loss sustained by the party with whom the contract is made.

The measure of damages and just criterion of loss to the owner, is the value of his property at the place of destination, after deducting freight.

Mathews, J., delivered the opinion of the court.

In this case the plaintiff sues the master and owners of the steam-boat Attakapas, to recover the value of a certain quantity of molasses, of which he was owner, and which he alleges was lost to him by the misconduct of said master, by acting in violation of, or neglect to comply with the conditions of a contract, by which the defendant Curry, promised and undertook to carry and convey said molasses from Attakapas to New-Orleans, for and on account of the owner. The cause was submitted to a jury in the court below, who found a verdict for the plaintiff, and assessed his damages to the sum of nine hundred eighty two dollars and fifteen cents, and judgment being thereon rendered, the defendants appealed.

The counsel for the appellants do not contest the liability of the master under the contract, and circumstances as proven in the case, but insist that the other owners are not legally bound by the agreement or contract made by him, as there is no evidence of their assent to it, and the captain of the boat did not act within the scope of his authorised powers as such.

The principal facts in relation to this contract, are as follow: the master of the boat who was also a part owner, being in New-Orleans, agreed with Fisher, Burke & Watson, the agents of the plaintiff, to transport empty barrels from the city to the plantation of Dubuclet & Benoit, situated on the Bayou Teche, in Attakapas, for the purpose of being filled with molasses, and when thus filled, to carry them back to New-Orleans, to be delivered to the factors of the plaintiff, &c.

The agreement thus to carry, was according to the usual trade of the boat; it is true, that there is no evidence which shows that the master was in the habit of making contracts to carry, to take effect *in futuro*. But we are unable to perceive any thing unreasonable or contrary to the usual course of trade, in which the boat was used in a contract, to transport produce at some future voyage between the well known *termini* of her voyages. We are of opinion, that the master had authority to make a contract, such as was entered into in the present instance, so as to bind the owners, and the

evidence is clear as to its violation and consequent loss of the molasses. But it is contended for the defendants, that the measure of damages assumed by the jury is erroneous. We think not; the true and just criterion of loss to the owner, is the value of his property at the place of destination, deducting the cost of freight, and it cannot be pretended, that the verdict exceeds that value.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

M'DANIEL *vs.* INSALL.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

A waiver of the right to have the evidence taken down by the clerk, is not a waiver of the right to have a statement of facts, so as to enable the party to prosecute an appeal.

Where there is not such a statement of facts, as the Code of Practice requires, and the evidence not sufficiently complete to enable the court to examine the case on its merits, yet, when justice requires it, the case will be remanded for a new trial.

This is an action to recover the value of a slave, hired by the plaintiff, to the defendant, and which the former alleges, was lost by the negligence and misconduct of the latter. The petition charges, that he hired a negro girl, about eighteen years of age, to the defendant for a year, that about nine months afterwards the girl became sick, of bilious fever, on the defendant's plantation, who neglected to have her properly attended to, or to send for a physician, or to give her any medicine, or notify the plaintiff of her condition, for about *seven* days, when she had continued to get worse daily, and

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sunk so low in disease, that it was impossible to save her. He charges the defendant with gross negligence in not calling in medical aid, and notifying him of her condition. He prays judgment for seven hundred dollars, as the value of said slave.

The defendant pleaded a denial; reserving his right to spread on the record afterwards, more fully, his matter of defence.

At the trial, the plaintiff obtained leave of the court, to amend his petition by adding two interrogatories, to be answered by the defendant, in open court, which was objected to, but no bill of exceptions taken.

1. Did not the plaintiff hire to you the negro woman mentioned in the petition? If yea, at what time, and for how long, and for what price?

2. Did not the said negro woman belong to the plaintiff, and had he not had possession of her for some time before he hired her to you?

The defendant refused to answer the interrogatories.

On the trial, the depositions of several witnesses, taken on interrogatories, propounded by the parties, were read. The testimony showed, that the defendant employed the slave on his plantation as a cook, and in the month of September, she was taken sick of a bilious fever, and was put in a cabin about one hundred yards from the dwelling house. The witnesses state they do not know how she was treated, but that the defendant, was not a cruel or bad master. One witness swears, that the defendant sent word by him to the plaintiff, that his negro was sick, which message, he delivered. It appeared that the slave was sick a few days before the defendant notified the plaintiff of it, and that she died four or five days after the plaintiff took her home, of bilious inflammatory fever.

The testimony of two witnesses, who testified orally, was not taken down by the clerk. The presiding judge took brief notes of their testimony, to enable him to charge the jury.

Singleton, one of the witnesses alluded to, states the girl took sick on Monday, and word was sent on Sunday follow-

ing, to the plaintiff; she kept about, worked some, but still complained, she cooked, washed and worked out. He bled her on Tuesday, by defendant's direction. Heard defendant tell the servants to ask her what she wanted. It was a sickly time. Defendant was at home all the time of her illness; paid little attention to his own slaves when sick. On Saturday she got worse. She was pregnant. On Sunday sent for Mr. O'Bannon to see her, and notified plaintiff, sent for no physician, and no medicine was given to her. He gave medicine to his own slaves when sick. He expressed a wish to send the slave home, but witness does not recollect on what day.

The evidence further showed, that the plaintiff did not call a physician, for four or five days after he took the slave home. The doctor testifies, he was called in about ten hours before she died; when he first saw her, she was in a state of insensibility, her extremities cold.

The jury returned a verdict for the plaintiff, of three hundred dollars. The defendant's counsel moved for a new trial, on the ground, that the verdict was contrary to law and evidence.

The judge's charge to the jury, was in substance, that "if defendant's neglect was such, as to convince the jury, that it was the cause of her death, he is responsible; but not else."

The motion for a new trial was overruled, and judgment rendered in conformity to the verdict. The defendant appealed.

Lewis, for the plaintiff and appellee, moved to dismiss the appeal. 1. Because there is no statement of facts, or bill of exceptions in the record. 2. There is no certificate of the judge who tried the cause, nor of the clerk, *certifying* that *all* the evidence on which the cause was tried, is in the record. 3. Because the whole of the evidence on which the cause was submitted to the jury, was not taken down by the clerk, &c.

Linton, for defendant and appellant, at the same time, presented a petition, praying for a *mandamus* to the district

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judge, requiring him to show cause, why he will not make a statement of the evidence of John Singleton, a witness, examined in the trial of the cause, whose testimony was not taken down in writing by the clerk, &c.

The court ordered the *mandamus* to issue accordingly.

The district judge showed for cause, that he was unable to make any other statement of facts, of the testimony of said witness, further, than what was contained in his notes, taken on the trial, to aid him in charging the jury. That he cannot return his notes as a complete statement of facts, but annexes them to this answer. He further answers and says, that at the trial, the counsel for both parties, expressly waived their right, to have the testimony taken down by the clerk, from which, he inferred no statement of facts would be called for; that if he had had the slightest intimation that he would have been called on for a statement of facts, he would have had the testimony taken down by the clerk, or have taken full notes of it himself. He further says, that it was several days after the trial, when he was called on for the first time, for a statement of facts, when it was impossible for him to recollect the testimony given on the trial of the cause, except so far as contained in his notes; that he handed his notes to the defendant's counsel, telling him that it was the only statement of facts then in his power to make.

The clerk certified to all the other evidence, being in the record.

Lewis, for the plaintiff, moved to dismiss the appeal.

1. Because there is no statement of facts or certificate of the judge, as required by *Code of Practice, art.* 586. 4. *La. Reports*, 8. 3 *La. Reports*, 454, *and authorities there cited.*

2. Defendant by not causing *all* the testimony to be taken down in the court below, has lost his right to have the cause reviewed in the Supreme Court. *Code of Practice, art.* 601.

Linton, contra.

Bullard J., delivered the opinion of the court.

In this case, the appellant moved for a *mandamus* against the judge, before whom the trial was had, directing him to make a statement of facts, or to show cause why he does not. The judge in his return shows for cause, for not making a complete statement of facts, that at the trial, both parties expressly waived the right of having the evidence taken down by the clerk, and he concluded from that circumstance, that a statement of facts, would not be called for; that he cannot recollect the evidence, except so far as contained in his notes taken on the trial, which accompany the return; and which he says, were taken merely for his own satisfaction, and to enable him to charge the jury.

A waiver of the right to have the evidence taken down by the clerk, is not a waiver of the right to have a statement of facts so as to enable the party to prosecute an appeal.

The attorney for the appellant, applied to the plaintiff's attorney, to agree with him on a statement of facts, in due time. It was declined and application made to the judge. A waiver of the right to have the evidence taken down by the clerk, is not, in our opinion, a waiver of the right to have a statement of facts, so as to enable the party to prosecute an appeal. The record does not furnish us such a statement of facts, as the Code of Practice requires, and the case cannot be examined in this court, on the merits. Justice requires, that it should be remanded for a new trial.

Where there is not such a statement of facts as the Code of Practice requires, and the evidence not sufficiently complete to enable the court to examine the case on its merits, yet, when justice requires it, the case will be remanded for a new trial.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled and reversed, the verdict set aside, and the case remanded for a new trial, and that the appellee pay the costs of the appeal.

LAPOINTE *vs.* GUIDRY.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

On a mere matter of fact, submitted to a jury, when the evidence does not show the verdict to be clearly wrong, the verdict and judgment will not be disturbed.

This is an action of trespass, in which the plaintiff claims three hundred dollars, for damages sustained, by the defendant's cattle breaking into his fields, and destroying his fences and every thing in the fields; and for fifty dollars damages, as the price of a favorite dog, which he alleges, the defendant wantonly shot, while assisting in turning the defendant's cattle out of the fields.

The defendant excepted to answering to the merits, on account of vagueness and want of certainty in the allegations of the petition. On answering to the merits, he pleaded a general denial; and that no damages should be allowed, because the enclosures or fences were in bad condition, at the time the plaintiff complains of the trespass being committed, and not made in conformity to the rules and regulations of the parish.

The testimony consisted entirely of witnesses, whose statements were taken down by the clerk. The plaintiff showed by several witnesses, that his fence was about five feet high, surrounded on the outside by a ditch, and made of cypress *pieux*; that the defendant's cattle broke in repeatedly, by breaking and throwing down the posts and *pieux*. One witness says, the plaintiff repeatedly mended his fences, and that he was ultimately compelled, to abandon his field to the defendant's cattle. The field had all the gleanings in it, and witness would not have taken eighty dollars for his own field, which was smaller than plaintiff's; this was in the fall. It was proved, that the plaintiff's dog was killed by defendant,

but no specific value was proved, or damage sustained by his loss; it was only said, he was *a good hunting dog*.

Defendant's witnesses stated, that at the time of the damage complained of, the plaintiff's fences were in bad order, that they consisted of three or four *pieux*, the posts were tied with strings in many places, and in a wet time they gave way, and the *pieux* dropped down. The fence appeared to be a year or two in this fix.

The jury returned a verdict for the defendant. The verdict was rendered on the 17th of May, 1833, and the judgment of the court thereon, was rendered and signed on the next day.

The plaintiff appealed.

1. *Neveu*, for the plaintiff, contended that the judgment and verdict should be reversed. The judgment was signed before the three judicial days elapsed, required by the Code of Practice.

2. The evidence clearly shows, that the plaintiff is entitled to damages.

Voorhies, contra, submitted the case for the defendant, on the following points:

1. This court has repeatedly decided, that it will not disturb the verdict of a jury, unless it appears to be clearly against the law and evidence.

2. No motion for a new trial having been made, the judgment and verdict must be confirmed.

Bullard, J., delivered the opinion of the court.

On a mere matter of fact submitted to a jury, when the evidence does not show the verdict to be clearly wrong, the verdict and judgment will not be disturbed.

This is an action of trespass, in which the plaintiff claims remuneration, for damages done by the cattle of the defendant, breaking into his enclosures, and for killing his dog.

The defendant pleaded the general issue; and that the plaintiff's fences were not such as are required by the police regulations of the parish. The jury found a verdict for the defendant, and the plaintiff appealed.

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The whole matter, which was that of fact only, was left to the jury, and from the evidence in the record, we are not enabled to say, that the verdict was so clearly wrong, as to authorise the interference of this court.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BABINEAU, CURATOR, &c. *vs* BENDY AND DUGAT.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The law presumes certain formalities, which must be pursued in order to obtain a judgment of interdiction against a person above the age of majority.

The law presumes every person above the age of majority, capable of managing his own affairs; even deaf and dumb persons not excepted.

Where a person has not been interdicted, in pursuance of law; but being deaf and dumb, and a curator appointed to manage his affairs, such curator, cannot claim a legal mortgage on the real estate of another, who has intermeddled, and collected moneys due said deaf and dumb person.

This action was commenced by the plaintiff, as curator of Jean Babineau, alleged to be an interdicted person, against one Joseph Dugat, to render him liable for intermeddling with the estate of said Babineau, for the sum of two thousand dollars, with a legal mortgage, from the time of such intermeddling; and against W. Bendy, to subject a plantation purchased by him, from Dugat, since the above mortgage attached. The plaintiff alleges that Jean Babineau was deaf and dumb, from his nativity, and incapable of managing his affairs; that in January, 1819, one J. C. Guilbeau, was

regularly appointed a curator of said Babineau, who collected and received considerable sums inherited by the latter, and died in 1820, without rendering any account. That in 1821, Joseph Dugat, maternal uncle to the interdicted, then without any curator, took upon himself, without any authority, to administer his estate, and collected and received from the widow and heirs of Guilbeau, the former curator, about the sum of two thousand dollars, which he still retains: that in consequence of such interference, without authority, or any appointment, all his property from that date became legally mortgaged for the payment of all sums which may be found due by him. That since then, and in the year 1831, the said Dugat, sold a sugar plantation to one W. Bendy, which was, and is liable to said mortgage, in favor of said interdicted, and that said Dugat, has left this state, and is now absent therefrom: The plaintiff, further alleges, that he has been duly appointed curator, to the said Jean Babineau, and as such, fully authorised to administer his affairs: He prays that a curator *ad hoc*, be appointed to represent Dugat, and that he be duly cited, and that he have judgment against the said Dugat, for the sum of two thousand dollars, with a legal mortgage, on all the real property possessed and owned by him, since the year 1821, until final payment, and that the said Bendy, be cited to show cause, why the plantation, purchased by him, should not be seized and sold in payment of said claim.

The defendant, Bendy, pleaded a general denial; admitted the purchase of the plantation, from Dugat, now absent in Texas, for a valuable consideration, and who bound himself to warrant the title thereto: He prays, that a curator *ad hoc*, be appointed to represent and defend said Dugat, and that the plaintiff's demand be rejected.

But in case judgment should go against the land, he prays judgment against Dugat, annulling the sale and decreeing the re-payment of five hundred dollars, which he has advanced, and that his notes be given up and cancelled, &c.

The curator *ad hoc*, of Dugat, pleaded a general denial, &c.

The evidence showed, that when the first curator of Jean Babineau died, in 1820, Dugat being the maternal uncle of the latter, took him to his house and acted as his curator, and administered his person and estate, without any legal appointment, from any court whatever; that he kept the said interdicted until he (Dugat) absconded from the state, in 1831. In 1821, Dugat made a settlement with the representatives of the late curator, and received the sum of two thousand dollars, on account of said Jean Babineau, which he never paid over, and still owes. The plaintiff also produced in evidence the act of sale from Dugat to Bendy, of the plantation claimed, made in 1831.

The court, after hearing all the evidence, gave judgment against Dugat for the sum of two thousand dollars, with legal interest from judicial demand, *without* recognising any legal mortgage on any of his property, and discharged Bendy from all liability, on account of the plantation.

The plaintiff appealed.

The only sentence of interdiction ever pronounced, appears to have been made in 1819, by a family meeting of the relations of said Jean Babineau, when he was twenty-eight years of age, before the parish judge of St. Martin, which is written in the French language. These proceedings were homologated, and Guilbeau was appointed curator to the interdicted. The judgment of homologation, is written in English. The evidence showed, that the only infirmity which the interdicted labored under, was want of hearing and speech, that he was deaf and dumb, from his nativity.

Simon, for the plaintiff.

1. Contended, that under the *art.* 3283, *of the La. Code*, there is a legal mortgage on the property of those who have intermeddled with the administration of property of interdicted persons. Dugat, without being legally appointed the curator of Jean Babineau, but having holden himself out as curator, duly appointed to the said individual, has received a sum of two thousand dollars, in the right of said Babineau, has now become subject to the consequences of his intermeddling.

2. A curator had formerly been appointed to Jean Babineau, as an interdicted person; the proceedings were had under the *art.* 409, *of the La. Code*, and said proceedings were sufficient to constitute the said Babineau, *an interdicted person*, in the legal sense of the term, therefore, the property sold by Dugat to Bendy, is subject to the legal mortgage of the interdicted.

Lewis & Brownson, for the defendants.

1. Interdiction can only be pronounced by a judgment of the Probate Court. *Civil Code, p.* 78. *art.* 5-8. *p.* 80, *art.* 14, *and Code of Practice.*

2. There is no judgment interdicting Jean Babineau. The act set up as evidence of a judgment of interdiction, is a *nullity*, because it is written in *French*, and is not accompanied by any of the formalities required by law, in such cases; there is no petition, citation nor default taken. 1. *Martin's Digest*, 216. 1 *La. Reports*, 438.

3. No tacit mortgage can exist in this case, because *there was no person interdicted. Civil Code*, 456, *art.* 20.

4. No legal mortgage exists, except in cases *expressly* provided by law. *Civil Code*, 454, *art.* 16. *Arrêts de la Cour de Cassation, vol.* 26, *p.* 149, *n.* 46, *du* 27 *Avril* 1824, on articles 2121 *and* 2135 of *Code Napoléon;* which agree with our *Civil Code, p.* 454, *art.* 19.

5. No legal mortgage can exist in this case, against third persons, because the interdiction was not published as the law directs. *Civil Code, p.* 78, *art.* 11.

6. There is no record of the proceedings of interdiction in the parish where the land lies, to put third persons on their guard.

7. The parole testimony in the cause is not good against Bendy, for any purpose; a record of a judgment of interdiction by the proper tribunal, being the only legal evidence of that fact.

Mathews, J., delivered the opinion of the court.

In this case, Dugat, one of the defendants is sued as having intermeddled with, and taken on himself, the management of the person and estate of Jean Babineau, for whom the

plaintiff acts as curator and alleging that he, the said Jean, is a person interdicted as incompetent to administer his own property, &c. in consequence of being deaf and dumb from his birth. The proceeding against the defendant, Bendy, has for its object, to subject certain property in his possession, as purchaser from Dugat, to a tacit or legal mortgage, which is claimed in favor of the interdicted person, on all Dugat's property. The court below, rendered judgment against the latter, for the amount of funds by him received on account of the interdicted, but decided against the claim of mortgage, on the property in the hands of Bendy, which had been purchased from Dugat. From this judgment, the plaintiff appealed.

The law presumes certain formalities which must be pursued in order to obtain a judgment of interdiction against a person above the age of majority.

The law presumes every person above the age of majority, capable of managing his own affairs, even deaf and dumb persons not excepted.

Where a person has not been interdicted in pursuance of law; but being deaf and dumb, and a curator appointed to manage his affairs, such curator cannot claim a legal mortgage on the real estate of another, who has intermeddled and collected moneys due said deaf and dumb person.

The correctness of this judgment, in relation to Dugat, is not questioned, and the right of mortgage claimed, depends solely on the fact, whether the deaf and dumb person was legally interdicted.

The evidence of the case, shows that he had, during his whole life, been considered as incapable of managing his estate or person, with ordinary judgment and discretion, in consequence of the want of hearing and speech; but no formal judgment of interdiction, seems ever to have been pronounced by any competent tribunal. It is true, that a curator was appointed to him, at a time when he was over the age of majority, and after the death of the person so appointed, Dugat, the maternal uncle of the individual presumed to be interdicted, assumed to act for him. The mortgage claimed on the property of the intermeddler, is one created by law, and must be confined to cases expressly provided for. The article of the old Code, relied on by the plaintiff, is found at page 456, and is expressed in the following words, "there is a legal mortgage on the property of those, who, without being tutors or curators, have taken on themselves, the administration of the property of minors, persons interdicted or absent, from the day when they did the first act of that administration."

The law prescribes certain formalities, which must be pursued, in order to obtain a judgment of interdiction against

any person who, from being of the age of majority, is presumed to be capable of managing his own affairs; and we know of no exception in relation to the deaf and dumb. The person in whose favor the mortgage is claimed, in the present instance, not having been interdicted in pursuance of the rules prescribed, is not one of those for whose benefit and protection the article of the Code cited provides. And according to the article 16, page, 454, of the same book, "there are no legal mortgages, but in the cases directed by law."

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs, &c.

NIBLETT *vs.* WHITE'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where a person borrows the slave of another, to do certain work for him, and through his neglect, or imprudent conduct, the slave dies, he will be bound to pay his value to the owner.

So where A borrows the slave of B, to haul a load seven or eight miles, and a storm comes on, and the borrower refuses to stop and take shelter for himself and the slave, and the latter is lost, A will be answerable to B, in damages for the value of the slave.

This is an action for damages, against the widow and heirs of the late Joseph White, to recover the value of a negro boy, owned by the plaintiff, and alleged to have been lost by the negligence of the said White, while in his possession on loan.

The petition charges, that in the month of February, 1832, the plaintiff loaned a negro boy named Cesar, about sixteen years of age, to Joseph White, then living in the parish of Lafayette, who engaged, as he was bound by law, to take good care of said boy, and treat him well. That instead of doing

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so, he required the boy to work after night, in the cold and rain, at a very unusual hour, without using any precaution to protect him from the cold and inclemency of the weather, in consequence of which he died; he alleges the boy was worth eight hundred dollars, and that he has sustained damages resulting from his loss, of two hundred dollars more; that his widow and heirs have accepted his succession, and become liable for the amount of his said claim, for which the said White, by his negligence and misconduct, had rendered himself liable in his life-time. He prays judgment for the said sums amounting to one thousand dollars.

The defendants plead a general denial, except what is expressly admitted: They admit that Joseph White had permission of the plaintiff, to employ his boy on a Sunday, about the time mentioned in the petition, but that he took all proper care of said slave, which his situation and circumstances would permit, and that the boy was lost without any fault or negligence on the part of the deceased. They pray that the plaintiff's demand be rejected.

The testimony showed, that the plaintiff and White lived neighbors to each other, and were in the habit of borrowing and lending to each other. That on a Saturday, White was assisting the plaintiff with his oxen to move a house somewhere in the neighborhood; that White had some *pieux* near the place to which the house had been removed, told plaintiff it would be a good time for him to get his *pieux* home if the plaintiff would hire his negroes and oxen the next day, (Sunday,) to which the plaintiff assented on White's agreeing to pay the negroes for their Sunday work. It was seven or eight miles to White's house, to which the *pieux* had to be hauled, and they were late in the day getting at them. The weather which had been warm on Saturday, the day preceding, (the negroes being thinly clad,) suddenly changed and blew a storm of rain and sleet. The negroes and carts had a bad morass or *marais* to cross in their way; night came on, and by the time they got across the morass to a house, the negro boy in question, was frozen to death.

The plaintiff's testimony further showed, that it was one or two o'clock at night, when White came home, nearly perished with cold, and told his wife, he wished he had never seen the *pieux;* that one of the plaintiff's negroes was dead, and he expected he would have him to pay for.

The district judge was of opinion, the defendant's were responsible for the value of the slave lost, gave judgment accordingly for six hundred dollars, and costs of suit. The defendants appealed.

Brownson, for the plaintiff.

Garland, for the defendants.

Martin, J., delivered the opinion of the court.

The plaintiff claims the value of one of his slaves, which he lent to White, and who through the gross neglect and ill conduct of White, was compelled to travel, during a great part of the night, while a very uncommon storm raged, although very thinly clad, so that he suffered so much through fatigue and the inclemency of the weather, that he died.

Where a person borrows the slave of another to do certain work for him, and through his neglect or imprudent conduct, the slave dies, he will be bound to pay his value to the owner.

The defendants denied the ill usage and misconduct attributed to him.

There was a judgment for the plaintiff, and the defendants appealed.

So where A borrows the slave of B, to haul a load seven or eight miles, and a storm comes on, and the borrower refuses to stop and take shelter for himself or the slave, and the latter is lost, A will be answerable to B, in damages for the value of the slave.

No question of law arises in this case which turns entirely on matters of fact. We have carefully examined the testimony, and are unable to conclude that the district judge erred. It appears the deceased was warned by a person near whose house he passed, of the danger of pursuing his journey during the storm, and the offer was made to him of a shelter for himself and the negroes who were with him; but he persisted in continuing to travel.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

D'ARBY'S HEIRS *vs.* BLANCHET'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

The principle, that possession of a part of a tract of land, is possession of the whole, and sufficient to prevent the adverse party from acquiring absolute title by prescription, cannot prevail over the adverse possession of the other party, under a title of higher dignity, and a definite location by authority of the sovereign.

Where land has been possessed, even under an erroneous location, for more than thirty years in conformity to it, in the presence of the adverse claimant, the plea of prescription will prevail, and the possessors quieted in their possession and title.

The plaintiffs sue, as the testamentary heirs of Pierre D'Arby, f. m. c., deceased, late a resident of New-Orleans, to recover from the defendants, who are the heirs and legal representatives of Olivier Blanchet and wife, both deceased, a tract of land, fifteen arpents on one side, and fourteen on the other side of the river Vermilion, with the depth of forty, being the largest portion of an original tract, of twenty arpents front on each side of the Vermilion, with the depth of forty, granted by the Spanish government, finally to the plaintiffs' ancestor, by order of survey, signed by governor Galvez, the 22d of March, 1791. The plaintiffs allege, that the defendants are in possession of the land, and refuse to give it up: they pray that it be decreed to belong to them, and that they be quieted in the possession thereof.

The defendants claim the land, under a complete legal title, derived from the plaintiffs. They allege that the plaintiffs sold eleven and one-half arpents, being all of the remaining tract of land, claimed by them in their petition, to one Pierre Dubois, by public act, dated May 8th, 1817, being six arpents on the right, and five and one-half arpents on the left side of the Vermilion; and as the parties were uncertain as to the number of arpents, then belonging to the vendors, agreed, that if there should be a greater quantity than was

specified in the act of sale, the purchaser was to take the surplus, at twenty-five dollars per arpent, &c. They further allege, that at the sale of the succession of said Pierre Dubois, the 9th June, 1823, Madame Olivier Blanchet purchased seven and one-half arpents on the east side, and six arpents on the west side of the Vermilion, of said land, in two lots, all of which were sold with warranty; that by said sale to Dubois, the plaintiffs abandoned all pretentions to the land claimed by them, reserving only the right of twenty-five dollars, for the surplus arpents, as above stated. They further state, that their ancestor, Olivier Blanchet, purchased four arpents on each side of the Vermilion, adjoining the above lands of Dubois, from Jean Broussard, by act bearing date the 28th of May, 1813, and situated within the limits now claimed by the plaintiffs.

The defendants plead a general denial; and allege uninterrupted possession of the premises in themselves, and those under whom they claim of thirty years; and a possession of ten and twenty years, in virtue of a good and legal title; they plead the prescription of ten, twenty, and thirty years, and call their vendors in warranty.

The heirs of Dubois, called in warranty, admit the purchase of the lots, amounting to six arpents front on one side, and seven and one-half on the other side of the Vermilion, at the sale of the succession of their ancestor, but with no privilege for the surplus; that they are entitled to the surplus, on paying the plaintiffs twenty-five dollars for each surplus arpent, front; and that the plaintiffs have a good title to all of the land claimed by them, except the eleven and one-half arpents, sold to these respondents, and by them to the defendants, as before stated; and the surplus of the original tract, will be the property of Pierre Dubois, on the payment of twenty-five dollars for each surplus front arpent; wherefore they join the plaintiffs in their claim thereto, and support their title; and they intervene for this purpose.

After hearing all the evidence, and inspecting the plats and diagrams of the survey made of the land, the district

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judge gave judgment in favor of the plaintiffs, for the land claimed by them, with a condition that the heirs of Dubois, called in warranty, and who have intervened, take the benefit of the judgment, on their paying the plaintiffs twenty-five dollars for each front arpent, within ninety days from the date of said judgment. The defendants appealed.

The titles of the respective parties are set out and stated in the opinion of the court.

Simon, for the plaintiffs, and for the intervenors.

1. The order of survey in favor of Maison, is dated the 26th February, 1778, and is the oldest title. The same land was afterwards *conceded* to D'Arby, commencing at the point of Maison's, and running according to his boundaries; the act of concession, bearing date 22d March, 1791.

2. Hebert's ten arpents are bounded on one side by Maison, and on the other by the domain, and the title dates from the 23d June, 1781, (three years after the date of Maison's title, in whose right the plaintiffs claim.) Claude Broussard bounds on one side by Charles Hebert; and Pierre Gaillard is bounded on one side by Claude Broussard, and both claim under titles dated 23d June 1781.

3. All the foregoing claims are confirmed, according to the boundaries, fixed in their respective titles. The plaintiffs have possessed a part of the land under these titles. Actual possession of a part, with title to the whole, is possession of the whole. 9 *Martin*, 43.

4. There has been error in the location of these titles, but no conflict in the titles themselves; the defendants have no adverse title to that of the plaintiffs, and never intended to possess the land of the plaintiffs.

5. The boundary of Melançon, for whose land Maison's title calls, having been ascertained, the several tracts must be located according to the boundaries pointed out by the government; the grantees have no right to encroach upon each other's land, but must follow the calls of their respective titles. This case is in principle, the same as those reported in 1 *Martin, N. S.* 456. 3 *Ibid.* 11.

Brownson, for the defendants.

Bullard, J., delivered the opinion of the court.

This is a petitory action, by which the plaintiffs, as heirs of Simon D'Arby, seek to recover a part of a tract of land, of twenty arpents front on both sides of the Vermilion, by a depth of forty. The title exhibited by them, is an order of survey, dated in 1791, in favor of their ancestor, confirmed by commissioners certificate. This document recites, that the same land has been previously conceded to one Maison, in 1778, and by him abandoned to the domain, never having been cultivated by him. It calls to be bounded on one side by Melançon, and on the other by the domain. The commandant of the post of Attakapas, certifies that this tract had been surveyed for Maison, and two land-marks (corners) planted in presence of Melançon, but no plat of survey accompanies his certificate.

The defendants set up title under three patents, in favor of Charles Hebert, Claude Broussard and Pierre Gaillard, severally, for ten arpents front on both sides of the Vermilion; the first calling to be bounded on one side by Maison, and on the other by the domain, dated June 23d, 1782; the second calls for the first, and the third for the second, both the latter being dated June 23d, 1781.

The defendants further plead the prescription of ten years.

It appears, that as early as the year 1800, by various exchanges and other alienations, these three grants had become the property of Gaillard, the immediate vendor of the defendants' ancestor. On the sixth of June, of that year, Gonsoulin, a Spanish surveyor, made a survey, and gave a location to them, according to which the defendants claim to hold them. On this plat of survey, the upper grant, that of Hebert, is represented as bounded by Maison or D'Arby on the upper side, according to the calls of the patent. The evidence shows, that the land has been holden from that period to this, in conformity to that survey.

But it is contended, on the part of the plaintiffs, that this was evidently an erroneous location, inasmuch as it did not

leave land enough for the claim of Maison, between the upper line, as established by Gonsoulin, and the lower line of Melançon; and that Maison had been previously put in possession, by metes and bounds. The original location of the Maison tract, is not shown by evidence before us, and admitting that this location by Gonsoulin was erroneous, still the land has been possessed for more than thirty years, in conformity to it, in presence of the adverse claimant.

It is, however, contended, that the principle settled by this court, in the case of Broussard *vs.* Duhamel, (3 *Martin, N. S.* 10,) is applicable to this, and that the plea of prescription cannot avail the defendants, inasmuch as all these titles were derived from the same source, and call to be bounded by each other, and no location is shown, which relates to all of them; that D'Arby possessed at least a part of his grant, and that possession of a part is possession of the whole, according to his title. It does not appear to the court, that the case cited is analogous to this. In that case, several purchasers hold under the same primitive title, having bought at the same time, different portions of it, and no regular survey had been made, designating the portion purchased by each. The court held, that an erroneous survey, made of some of the portions, was not such a partition as would enable one of them, who possessed in error, to avail himself of the ten years prescription. In the case now under consideration, the parties hold by distinct titles, derived immediately from the sovereign, and one of them shows a location by public authority, apparently correct. The principle contended for, by the plaintiffs' counsel, that a possession of a part of his land is a possession of the whole, cannot prevail over the adverse possession of the defendants, under a title of even higher dignity, and a definite location, by the authority of the sovereign.

The principle that possession of a part of a tract of land, is possession of the whole, and sufficient to prevent the adverse party from acquiring absolute title by prescription, cannot prevail over the adverse possession of the other party, under a title of higher diguity, and a definite location by authority of the sovereign.

The evidence shows, that an oak tree near the Bayou, was established as a land-mark by Gonsoulin, and has been recognised as the division line, between Herbert's patent and the land of D'Arby, and that the other titles below, on the Bayou, conform to that survey. Gaillard's house is shown to

have been near that tree. One of the witnesses was on the spot, shortly after the survey by Gonsoulin, and is confident that the oak tree is the boundary. In addition to this, it is shown, that D'Arby sold a part of his tract to Dubois, and in his sale it is described, as bounded on one side by Blanchet. At that time the defendants held, and actually occupied their land, as they do at this time, and at the sale of Dubois's estate, the defendants themselves purchased a part of the same land, adjoining them.

Where land has been possessed, even under an erroneous location, for more than thirty years, in conformity to it, in the presence of the adverse claimant, the plea of prescription will prevail, and the possessors quieted in their possession and title.

Upon the whole, after the best attention we have been able to give to this case, we are satisfied, that the evidence sustains the plea, of prescription, and that the defendants ought to be quieted in their possession and title.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the defendants be quieted in their possession of the land claimed by them, according to the survey made by Gonsoulin, and that the plaintiffs pay the costs of both courts.

BARCLAY vs. CONRAD ET ALS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the defendants purchased a sugar mill of the plaintiff, who is a merchant, part of which broke in pieces, on being put up, the latter is not responsible for the defects, unless he knew it was of bad quality, and represented it as good.

The defendant cannot set up redhibitory defects to the thing sold, and purchased by him, when sued for the price, after having sold it to another. By selling it, he affirms the first contract.

WESTERN DIST. *September*, 1834.

BARCLAY vs. CONRAD ET ALS.

Where a merchant sells a sugar mill, which proves defective, after being received and put up by the purchaser, he is still entitled to recover the price, unless there was some concealed defect, or he had represented it as sound, when not so.

A workman engages to furnish good work; but a merchant is not so bound.

This is an action instituted by the plaintiff, residing in Louisville, Kentucky, to recover of the defendants, one thousand dollars, the price of a sugar mill, delivered at their sugar plantation, in Attakapas.

He charges, that the price of said mill was one thousand dollars, and that he proposed to one of the defendants, if they were dissatisfied with it, he would take it back, which was refused; that they have since sold said mill, for the sum of twelve hundred dollars. He prays judgment for one thousand dollars, the price at which he sold it.

The defendants admit, that in consequence of a previous contract, the plaintiff delivered a sugar mill at Franklin, in Attakapas, in the fall of 1829, which they had conveyed to their plantation, and put up, and managed by a skilful mechanic, for the purpose of grinding their crop of cane; that notwithstanding all their care and skill, when they began to grind, the mill broke in pieces, in consequence of the defective materials, and manner in which it was made; that they had to throw it away as worthless, and put up a wooden mill. In consequence of the lateness of the season, occasioned by the defective quality of the mill, purchased of the plaintiff, they estimate a loss in their crop of sugar, of four thousand dollars, which added to the mechanic's bill of four hundred dollars, and freight of forty more, makes a sum total of their losses, amounting to four thousand four hundred and forty dollars, for which, after rejecting his demand, they pray judgment against the plaintiff, in reconvention.

The defendants, amending their answer, add the allegation of fraud, and charge the plaintiff with acting illegally and fraudulently, in knowingly selling them the defective sugar mill, in consequence of which, they sustained the damages claimed in the reconventional demand.

The defendants took the depositions of several witnesses, who testified to the breaking of the mill, after it was put up. Among these witnesses was the mechanic, who put up the mill. He states, it was the first horizontal mill he had ever put up, but thinks he understood his business well enough, to put the mill up in the right manner. The bevel wheel broke soon after they began to grind, and the defendants had to procure a wooden mill, to make up their crop. One witness estimates the loss of the defendants, to be half their crop, in consequence of the breaking of the mill. He also states, that they sold the broken mill for one thousand two hundred dollars.

The plaintiff's testimony showed, there was great difficulty in putting up horizontal mills, by the best of workmen; that they all break more or less. The same evidence showed that the defendants sold this mill for one thousand two hundred dollars, after getting a new wheel. It was also shown, the plaintiff's regular business was that of a merchant, and vending machinery of this kind.

The jury returned a verdict for the plaintiff, for the sum claimed. After an unsuccessful attempt to obtain a new trial, the defendants appealed.

The district judge charged the jury on the trial, "that it was admitted, the defendants bought the mill, and must pay for it. If the mill broke from its being badly mounted, it was no fault of the plaintiff, and he is not responsible. If the mill be of bad quality, did plaintiff know it, and represent it as good? If he did, he is answerable for all damages sustained by the failure of the mill; if not, he is not responsible. That as to redhibition, the thing must be restored; if the purchaser has sold it he thereby affirms the contract and must pay for it. The law cited from *Pothier*, that a workman engages to furnish good work, does not apply; the plaintiff is a merchant, and is not so bound. Nor is there here any violation of contract, by plaintiff; he did not warrant the mill as sound, and unless it had some concealed defect, and he represented it as sound, he is not liable." To which charge the defendants' counsel excepted, as being

contrary to law. He also required the judge to charge the jury, "that under the article 1928 of the La. Code, the plaintiff being bound, to warrant the soundness of the mill by him sold, he is liable for such damages as were contemplated at the time of the contract," &c., which the judge refused, and a bill of exceptions taken.

This case was submitted to the court without argument, by *Mr. Brownson* for the plaintiff, and by *Mr. Simon* for the defendants.

Martin J., delivered the opinion of the court.

The plaintiff claims the price of a sugar mill, sold and delivered to the defendants.

They admit the delivery, but charge the plaintiff with fraud, averring that he knew the mill was inartificially constructed, and made of so bad materials that it was absolutely worthless; and being put up by the defendants, immediately after they received it, several parts of it broke off, as soon as it was put in motion; that they were unable to make use of it, after they were at considerable expense and charges, in putting it up, and endeavoring to avail themselves of it. They further aver, that they sustained heavy losses, in consequence of the disappointment, and their inability to use it, and the consequent impossibility of grinding their cane crop.

Where the defendants purchased a sugar mill of the plaintiff, who is a merchant, part of which broke in pieces on being put up, the latter is not responsible for the defects, unless he knew it was of bad quality and represented it as good.

The defendant cannot set up rehibitory defects, to the thing sold and purchased by him, when sued for the price, after having sold it to another. By selling it, he affirms the first contract.

A workman engages to furnish good work, but a merchant is not so bound.

There was a verdict and judgment for the plaintiff; and the defendants appealed, after an unsuccessful effort to obtain a new trial.

Our attention is drawn to the charge of the court, who told the jury, "it was admitted that the defendants bought the mill, and consequently they must pay for it; that if the mill broke, in consequence of being badly mounted, it was no fault of the plaintiff, and he was not answerable. If the mill was of a bad quality, did the plaintiff know it, and represent it as good? If he did, he is answerable for all the damages sustained by the failure of the mill. If he did not, he is not responsible. As to redhibition, the thing must be restored. If the purchaser has sold it, he has affirmed the contract.

By the law cited from *Pothier*, a workman engages to furnish good work; the plaintiff is a merchant, and is not so bound. Nor is there here any violation of contract, unless there had been some concealed defect, and the plaintiff had misrepresented it as sound."

It does not appear to us, that the charge of the court was erroneous. On the merits, the evidence shows, that the mill was sold by the defendants, for one thousand two hundred dollars, while they had bought it for one thousand dollars.

The jury have been of opinion, that the defendants have not supported their defence. On an appeal to the judge, by a motion for a new trial, he has been of opinion, that they have not erred.

Our best attention to the statement of facts, has led us to the conclusion, that it is not our duty to interfere.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

Where a merchant sells a sugar mill which proves defective after being received and put up by the purchaser, he is still entitled to recover the price, unless there was some concealed defect, or he had represented it as sound when not so.

A workman engages to furnish good work; but a merchant is not so bound.

COON *vs.* BRASHEAR ET ALS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Prescription when once acquired, may be either tacitly or expressly renounced.

When a party once voluntarily renounces prescription in his favor, in the course of the trial in the inferior court, he cannot renew it, or avail himself of it in the Supreme Court.

The voluntary waiver of the plea of prescription, by a party in a judicial proceeding, especially when accompanied by a concession, on the part of his adversary, made in consequence thereof, is the strongest presumption of the renunciation of the right itself.

WESTERN DIST. *September*, 1834.

COON VS. BRASHEAR ET ALS.

Where a workman sues to recover his wages, at a stipulated hire, per month, as a brick-layer, and evidence is introduced without objection, to prove the usual wages of that class of mechanics, the jury are the judges of the *value of the work* charged as having been done, on the evidence then before them.

In a suit to recover wages, at a stipulated hire per month, by a mechanic, it is sufficient for him to prove his contract, and the length of time he was in the defendant's employment.

Where a witness swears falsely, on a material point, in a cause, the jury is authorised to disregard his testimony altogether.

The jury are the judges, whether a misstatement by a witness was wilful, or material, and what degree of credit ought to be given to his testimony.

The Supreme Court can judge only of the effect of the whole evidence of the case taken together, and whether the verdict of the jury is manifestly against, or without legal evidence. This is the principle uniformly adhered to, and when the verdict is not of this character, it will not be disturbed.

The exception or plea, that no amicable demand was made, must be specially pleaded, and in *limine litis*. It is too late to put in the exception after *contestatio litis*.

This is an action, for work and labor done as a mechanic, at a stipulated hire per month, in which the plaintiff claims from the defendants the sum of two thousand one hundred and twenty six dollars. He charges, that he made an agreement to work for the plaintiffs as a mechanic, at their sugar farm in Attakapas, at forty dollars per month, from the middle of February 1828, until the middle of July following; and that after that period, and up to the 7th of February, 1832, as an inducement for him to continue, the defendant raised his wages to forty-five dollars per month, until the whole amount of his wages amounted to two thousand one hundred and twenty-six dollars. He prays judgment for this sum, with legal interest from judicial demand.

The defendant pleaded a general denial; admitted the plaintiff had been in the habit of working for him, more or less, in the period alleged, but not in the manner set forth in the petition. That at one time, he worked by the month and

then by the day, as appears by a memorandum of account handed by him to the defendants, which he stated to be his whole account, up to the time when he left their employment. They annex an account for moneys and merchandise advanced, drafts and physicians' bills, paid at various times, when he was sick and unable to work, and for boarding and lodging while sick, amounting to one thousand and seventy dollars and sixty one cents, which they plead in compensation.

At the commencement of the trial, the defendants pleaded the want of an amicable demand.

After the trial had progressed, the defendants withdrew their plea of prescription, which had been previously filed, and the plaintiff withdrew his objections to the signature to a certain paper, purporting to have been signed by him.

On the trial the plaintiff offered several witnesses to prove the time he worked for the defendants, and his agreement with them. The defendants offered in evidence, several account books, receipts and accounts of plaintiff, and orders which had been paid by them; and the testimony of several witnesses to prove, that the plaintiff was frequently sick, from imprudence and other causes, and lost much time. The counsel for defendants, moved the judge to charge the jury, "that they were not the judges of what was the value of the services of the plaintiff, as a brick-layer, *per day*, but that the plaintiff was bound to prove to them, by evidence offered before them," which the judge declined, but told the jury, "they were the judges of the value of the work on the evidence before them;" to which *refusal* and *charge*, the defendants took a bill of exceptions.

The jury on examining and hearing the whole case, returned a verdict for a balance due the plaintiff of three hundred and sixty seven dollars. Judgment was rendered in conformity therewith, except as to costs, which decreed that the plaintiff pay costs up to the time of filing the defendants' answer, and that the latter, pay all subsequent costs.

The defendants appealed. In answer to the appeal the plaintiff and appellee prayed, that the judgment be corrected, so far as to condemn the defendant to pay *all* the *costs*.

Western Dist. September, 1834.

COOK vs. BRASHEAR ET AL.

Lewis and Brownson, for the plaintiff and appellee.

1. The want of an amicable demand, is an exception, that must be pleaded *in limine litis*, and in this case came too late. 4 *La. Reports*, 105.

2. Defendants' plea of prescription, in the Supreme Court, cannot be received, because the same plea was put in below, and afterwards *specially waived*.

Wharton, contra.

Bullard, J., delivered the opinion of the court.

The plaintiff sues to recover his wages as a mechanic, in the employment of the defendants, for a period of several years, a part of the time at the rate of forty dollars per month, and a part at forty-five. The answer admits, that the plaintiff had been in the habit of working for the defendants, but not at the rates of wages stated by him; compensation, as to a part of the demand, was also pleaded, and prescription. After this answer to the merits, the defendants further pleaded, the want of an amicable demand.

During the trial, the plea of prescription was voluntarily withdrawn, by the defendants, simultaneously with certain concessions made by the other party, as to a disputed point of evidence in the cause. In this court, the appellants have renewed that plea. This is opposed by the appellee who urges that the waiver of the plea in the District Court, is tantamount to a renunciation of prescription, which can validly be done after it is acquired, and that the renunciation cannot be retracted.

Prescription, when once acquired, may be either tacitly or expressly renounced.

When a party once voluntarily renounces prescription in his favor, in the course of the trial in the inferior court, he cannot renew it, or avail himself of it, in the Supreme Court.

The Code has established the principle, that prescription when once acquired, may be validly renounced. The renunciation is either express or tacit: "a tacit renunciation results from a fact, which gives a prescription of the relinquishment of the right acquired by prescription." *Article* 3424. As it is only by way of exception or plea, that a party can avail himself of prescription, it seems to us that the voluntary waiver of such exception in the course of a judicial pro-

ceeding, more especially, when accompanied by a concession on the part of the adversary, is such a fact, as furnishes the strongest presumption of an intention to renounce the right itself. Indeed it is difficult to distinguish between, in this case, a waiver of the exception, and a renunciation of the right, or to understand how the end is to be attained, after a voluntary abandonment of the means. We are therefore of opinion, that the plea cannot be renewed, in this court, so as to avail the defendants.

The voluntary waiver of the plea of prescription by a party in a judicial proceeding, especially when accompanied by a concession on the part of his adversary made in consequence thereof, is the strongest presumption of the renunciation of the right itself.

A bill of exceptions was taken to the charge of the judge to the jury, which is relied on by the appellant. His counsel moved the court to instruct the jury, that they were not the judges of what was the value of the plaintiff's services, as brick-layer, per day, but that the plaintiff was bound to prove it to them, by evidence offered before them; but the judge instructed the jury that they were the judges of the value of the work, on the evidence before them. It is true, the plaintiff sued for wages, at a stipulated hire, and the question was, not what his services were really worth, but evidence had gone to the jury without exception, to prove the usual wages of that class of mechanics, and we think the judge did not err, in giving such a charge to the jury. He was clearly correct in refusing to give the charge asked by the defendants' counsel, to wit: that the plaintiff was bound to prove, the value of his services. It was enough for him to prove his contract, and the length of time he was in the defendants' employment.

Where a workman sues to recover his wages at a stipulated hire per month, as a bricklayer, and evidence is introduced without objection to prove the usual wages of that class of mechanics, the jury are the judges of the *value of the work* charged as having been done, on the evidence then before them.

In a suit to recover wages at a stipulated hire per month by a mechanic, it is sufficient for him to prove his contract and the length of time he was in the defendant's employment.

On the merits, it has been urged, that the verdict of the jury was contrary to, and without legal evidence. It has been particularly insisted, that the jury was bound to disregard the testimony of one of the principal witnesses, on the ground, that he had stated what was clearly proved to be false, and the counsel relies on the rule of evidence, as stated by Starkie and other writers on that branch of the law, "*falsum in uno, falsum in omnibus.*" 1 *Starkie*, 524.

It is true, that when a witness has wilfully perjured himself, on a point material to the cause, the jury is authorised to disregard his testimony altogether. But the jury is to judge

Where a witness swears falsely on a material point in a cause, the jury is authorised to disregard his testimony altogether.

The jury are the judges whether a misstatement by a witness was wilful or material, and what degree of credit ought to be given to his testimony.

The Supreme Court can judge only of the effect of the whole evidence of the case taken together, and whether the verdict of the jury is manifestly against or without legal evidence. This is the principle uniformly adhered to, and when the verdict is not of this character, it will not be disturbed.

The exception or plea that no amicable demand was made, must be specially pleaded and in *limine litis*. It is too late to put in the exception after *contestatio litis*.

whether the misstatement was wilful or material, and what degree of credit ought to be given to the witness. It is difficult to establish any technical rule on this subject. In the case now under consideration, it may have appeared to the jury, as it does to us, quite immaterial, whether the plaintiff put up two buildings or one, inasmuch as his demand was for services by the month, and not for the price of a particular job. It could not be supposed that the witness would wilfully perjure himself on a point of fact, which was wholly irrelevant to the issue, and could not avail the plaintiff. This court cannot control juries, as to the credit due to the statements of particular witnesses; we can judge only, of the effect of the whole evidence taken together, and whether verdicts rendered by them, are manifestly against, or without legal evidence. This is the principle to which we uniformly adhere, and which, in this case, does not authorise us to disturb the verdict of the jury.

The appellee in his answer, alleges that there is error in the judgment to his prejudice, which he prays may be corrected. It appears that after the answer to the merits, and on the eve of the trial, the defendants pleaded the want of amicable demand, and such demand not having been proved, the plaintiff was adjudged to the payment of costs, up to the time the answer was filed. We think the court erred in this particular. This court has already decided, that such exception should be specially pleaded, and in *limine litis*. It was too late to put in the exception after the *contestatio litis*. 1 *La. Reports*, 105.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed, and that the plaintiff and appellee recover of the defendants, the sum of three hundred and sixty-seven dollars, with costs in both courts.

M'INTIRE *vs.* WHITING.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The ceding debtor, after surrender and appointment of syndics, has no longer any capacity to appear in court, in relation to the property surrendered.

But where a ceding debtor has a qualified property in goods, acquired after the surrender as bailee or carrier, which are seized by a judgment creditor, he has a right to move the court and have the writ and seizure annulled and set aside.

Property belonging to the ceding debtor at the time of the surrender, cannot be seized in execution by a judgment creditor, who was a party to the *concursо*.

The District Court on motion, by an insolvent debtor, has the right to quash an execution, which improvidently issued, contrary to the order staying proceedings; the debtor, although incapable of appearing in court, in relation to the mass of the property surrendered, was a party to the original suit, and might well make such a motion.

This action commenced by a written motion of the defendant, to annul and set aside a levy and seizure made under a writ of *fieri facias*, which issued on a judgment of the plaintiff against the defendant, after the latter had made a cession of his goods.

The judgment upon which the *fieri facias* issued, was recorded in October, 1832, in the parish of St. Mary. The defendant is a resident of Texas, but was, at the time of recording the judgment against him, a partner in the commercial firm of George Whiting & Co., in a store, which had been carried on several years in the town of Franklin, in said Parish. On the 22d October, 1833, the firm of George Whiting & Co., filed their *bilan*, upon which the plaintiff's judgment was placed, as one of the debts owing by the firm. The surrender was accepted by the judge, and a meeting of the creditors ordered. The attorney of the plaintiff appeared before the notary, and swore that the amount of the said judgment was due to the plaintiff by the firm.

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In April 1834, the plaintiff caused execution to issue on said judgment, which was levied on sundry articles in possession of the defendant, but which he alleges are not his property. He presented a written motion, by way of petition, to the District Court of St. Mary, in which he alleges the seizure is illegal on several grounds, viz: that he is not the owner of the articles seized; "and that no legal or judicial process can be had on the said judgment against his person or property, nor against any property in his possession." He prays that the seizure be annulled and set aside, and that a forthcoming bond in the sum of three hundred dollars, which he gave for a portion of the articles seized, be cancelled. The district judge gave judgment accordingly, from which the plaintiff appealed.

Splane, for the plaintiff and appellant.

Brownson, contra.

Bullard J., delivered the opinion of the court.

The commercial firm of which the appellee was a member, having made a surrender for the benefit of their creditors, and obtained a stay of proceedings, the appellant or judgment creditor caused an execution to issue against one of the ceding debtors. M'Intire, the appellant had appeared at the meeting of the creditors, and a syndic had been appointed. Samuel Whiting, one of the firm represented in writing to the court from which the execution issued, that the sheriff, in virtue of said execution, had seized certain property in his possession, but not belonging to him, which had been sent by Mr. H. Whiting, as a present to his wife and family residing in Texas, and of which goods he was only bailee or carrier. He therefore moved the court to quash the writ, and to order the bond given to the sheriff for the forthcoming of the property to be cancelled. It was accordingly done, and M'Intire appealed.

The ceding debtor, after surrender and appointment of syndics, has no longer any capacity to appear in court in relation to the property surrendered.

His counsel contends that he had a right to levy his execution on property acquired by the ceding debtor, after his

surrender, and that the syndic alone has a right to inquire into the regularity of the proceeding in this case.

It is true the future acquisitions of a ceding debtor, coming to better fortune, may be applied to the payment of his debts, unless a release has been given, but it by no means follows that execution may issue in the first instance, on the demand of a judgment creditor. The ceding debtor after the surrender has been accepted, and a syndic appointed, has no longer any capacity to appear in court, in relation to the property surrendered, and if the execution in the present case had been levied on property belonging to the firm, or either of the partners, we should concur in opinion with the counsel for the appellant, that the appellee had no right to interfere, and ought not to have been listened to. The evidence does not show to whom the property seized really belonged. If we take the allegations of the plaintiff as true, he had only a qualified property in the goods acquired after the surrender, and in that case he had a right to interfere. It was a matter which did not regard the mass of the creditors. If on the other hand, the property belonged to the ceding debtor at the time of the surrender, the judgment creditor, who was a party to the *concurso*, had clearly no right to proceed by execution. On either supposition, the proceeding was irregular.

But it is further contended, that the court erred in quashing the writ and cancelling the bond on motion, that it could only be done by injunction regularly obtained, and prosecuted. We think the court had a right to quash the execution, which improvidently issued, contrary to the order staying proceedings, and as the appellee was a party to the original suit, he might well make that motion, although, without capacity to act in relation to the mass of property surrendered. The bond in question was but an accessary, and necessarily ceased to have any legal effect as soon as the execution was set aside.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

But where a ceding debtor has a qualified property in goods, acquired after the surrender as bailee or carrier, which are seized by a judgment creditor, he has a right to move the court, and have the writ and seizure annulled and set aside.

Property belonging to the ceding debtor at the time of the surrender, cannot be seized in execution by a judgment creditor who was a party to the *concurso*.

The District Court, on motion, by an insolvent debtor, has the right to quash an execution which improvidently issued contrary to the order staying proceedings.

The debtor, although incapable of appearing in court in relation to the mass of the property surrendered, was a party to the original suit, and might well make such a motion.

DAVIS'S HEIRS *vs.* PREVOST'S HEIRS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

In this case the following principle is settled and decided. 6 *Martin, N. S.* 265.

In a petitory action, where the defendants, their vendors and warrantors pleaded, 1st. The general issue; 2d. Prescription, by thirty years uninterrupted possession; 3d. Prescription, by more than ten years possession under a *just title and in good faith*; 4th. Silence of the plaintiffs for more than forty years in not asserting their title; and in support of these pleas, offered the *testimony of witnesses* to prove and make complete their chain of title, which was objected to by the plaintiffs; 1st. Because the defendants having admitted in their pleadings, that they had a written title, must produce it or account for its loss; 2d. Parole evidence cannot be received to prove title to land, or even its assessment for taxes; 3d. Because the object is to prove a reputation of title to land, which cannot be done, and being admitted: *Held*, that this evidence is illegal and inadmissible; and being admitted absolutely the District Court erred, because it is to judge of the admissibility of testimony and cannot discharge itself from this obligation by transferring it to the jury. It must be satisfied that the best evidence cannot be had before it admits inferior.

This is a petitory action, which was commenced in 1819, to recover from the defendants a tract of land, containing sixty arpents of land in front, by forty-two in depth, on both sides of the Bayou Teche. The plaintiffs derive title in virtue of three Spanish grants of twenty arpents each, to C. & J. Dugat, and J. B. Labeauve, in the year 1777. The defendants claim under the same original title, and set up a chain of title derived therefrom, through several conveyances and possession of the land in contest. See statement of the facts of this case in 12 *Martin*, 445. It was argued in the Western District, at the September term, 1822–3, by Mr.

Bullard for the plaintiffs, and by Moreau Lislet, and Mr. J. S. Johnston for the defendants. See 12 *Martin*, 445, *and* 1 *Martin, N. S.* 650.

At the September term, 1827, in Opelousas, an opinion was pronounced, in which the judgment of the District Court was reversed, and judgment entered for the plaintiffs against Prevost's heirs; and in their favor against Macarty's heirs, who were called in warranty.

Mazureau for Macarty's heirs, called in warranty, presented a petition for a re-hearing of this cause, at the September term, 1828. The re-hearing was granted.

Brownson & Hennen for the plaintiffs, replied in writing to the petition for a re-hearing, which without further argument, was submitted to the court.

Martin J., delivered the opinion of the court.

At the request of the defendants, a re-hearing has been granted in this case. On a re-consideration of the opinion already pronounced, we are left under the impression that it ought not to be changed.

It is, therefore, ordered, that the former judgment of this court be maintained, in the same manner, as if no re-hearing had been granted.

CHAIX *vs.* VILLEJOIN.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the evidence establishes, that the wife was in the habit, with the knowledge of her husband, and accustomed to make purchases for the use of the family, and he did not object thereto, but had often paid such bills, he will be still bound to pay the amount of such purchases.

This is an action on a store account, annexed to the petition, in which the plaintiff claims from the defendant, the sum of three hundred and twenty-three dollars and sixty-four cents, for goods and merchandise, sold and delivered to the latter in person, and to his wife.

The defendant pleaded a general denial; and averred, that if the articles charged in the petition, were sold to any person, they were not sold or delivered with his knowledge and consent, nor were they sold and delivered to any person, with his authority; that if said goods were purchased by his wife, he is not chargeable with them, as it was at a time when she abandoned his domicil, and was not under his control, &c., which facts were known to the plaintiff; and that he never authorised her to purchase goods. He prays, that the plaintiff's demand be rejected.

The evidence showed, that the defendant purchased a few of the articles himself, and that the remainder were purchased by his wife, but with his knowledge, and without notifying the plaintiff not to sell to her.

The defendant offered in evidence, a suit instituted by his wife, for a separation of bed and board, which suit was filed and dismissed, after the date when the last articles purchased, were delivered.

The plaintiff produced a notice, published by the defendant, notifying all persons whatever, not to trust or give credit to his wife, on his account, as she had abandoned him. The

date of this notice was, the 24th March, 1832, and the last of the purchases were made the 4th of the same month and year.

The district judge gave judgment in favor of the plaintiff, for the whole amount of his account, with legal interest, from judicial demand. The defendant appealed.

This cause was submitted to the court without argument, by *Mr. Crow* and *Mr. Brownson*, for the plaintiff, and by *Mr. Lewis*, for the defendant.

Martin, J. delivered the opinion of the court.

The defendant is appellant from a judgment, by which the plaintiff recovered the amount of certain articles of merchandise, sold and delivered by the latter, to the wife of the former, who denied she had any authority from him to make the purchase.

Where the evidence establishes that the wife was in the habit, with the knowledge of her husband, and accustomed to make purchases for the use of the family, and he did not object thereto, but had often paid such bills, he will be still bound to pay the amount of such purchases.

The case turns on the mere question of fact, whether such an authority was given by the husband to the wife, as would charge the former.

The district judge, who tried the cause, thought the evidence fully established, that the wife was in the habit, and with the knowledge of her husband, accustomed to make purchases for the use of the family; and that he did not object thereto, but often made payments for such articles.

It does not appear to us, the judge erred.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

GUIDRY ET ALS *vs.* REES.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The Civil Code of 1808, article 44, page 462, and page 430, article 10, provides, that the third possessor of mortgaged property, who is not personally liable for the debt, may require the property in the possession of the principal debtor, to be first discussed and sold, before coming on him, if the property of the debtor is not situated in too distant a part of the state.

According to the Code of Practice, article 72, the discussion of property not situated within the jurisdictional limits of the tribunal, where payment is to be made, *is disallowed.*

The provisions of the Code of Practice, limiting the right of discussion to property, situated within the jurisdiction of the tribunal of the place, where payment is to be made, does not apply to contracts, made before its enactment.

The effect of laws is generally prospective; and if they have a retrospective effect in any case, the intention of the legislature must be evident and clearly expressed. It cannot command obedience to laws, affecting the obligation of contracts, entered into before their passage.

It is not necessary, that the money required to defray the expenses of discussion of property, be tendered at the time of filing the plea; it is sufficient, if the money be deposited in court, in pursuance of an order, directing it to be done within a specified time.

This is a hypothecary action, against the third possessor of mortgaged property. The plaintiffs allege, that they obtained a judgment against Jean Guidry, *père*, in the Probate Court, for the parish of St. Martin, for the sum of eight hundred and forty-four dollars, with legal interest, and a legal mortgage thereon, and upon all the property owned and possessed by said Guidry, since the 24th October, 1819; and that in October, 1829, the said Jean Guidry, *père*, then

owner and proprietor of a tract, of five arpents in front, with a certain depth, situated in the parish of St. Martin, sold and conveyed the same to the defendant, who is now in possession. The plaintiffs claim their right of mortgage, on all the estate of said Guidry, in consequence of being their natural tutor. They allege, that they have been unable to satisfy their said judgment, out of any property of his, and they now proceed against the tract of land in the possession of the defendant, which they pray, may be seized and sold, to satisfy their claim, &c.

The defendant's counsel excepted to the plaintiffs' right, to proceed against the land in his possession, until he discussed a tract of land, containing near six hundred acres, in the parish of St. Landry, which is the one the defendant gave said Guidry, *père*, in exchange for the one the plaintiffs are now pursuing; that the plaintiffs, by their hypothecary action, are required to discuss the property, last in possession of the debtor, before coming on that, now in his possession; which he prays, may be done.

At the November term of the court, a decree was rendered, sustaining the plea of discussion, and suspending all proceedings against the property, in the possession of the defendant, until the plaintiffs have discussed, and caused to be seized and sold, so far as it will be sufficient, the tract of land belonging to the original debtor, to satisfy their claim; and that the cause be continued, until said discussion be carried into effect; and in order to carry on said discussion, the defendant is to deposit, within thirty days, with the clerk of the court, fifty dollars, to defray the expenses thereof; and on failure to pay said sum, within the thirty days from the date of the decree, the defendant is to be forever barred, from setting up and requiring said discussion. From this decree, the plaintiffs appealed.

Simon, for the plaintiffs.

1. The defendant, in this case, cannot avail himself of the plea of discussion, which he sets up. In the first place,

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in his act of exchange with the principal debtor, he has provided against this action, by reserving a mortgage on the land, by him given in exchange, in case of eviction by an hypothecary action. He also had notice of the plaintiffs' claim and mortgage, and bought at his own peril.

2. The defendant does not bring his case within the provisions of the article 72, of the Code of Practice. No tender of the money, necessary to defray the expenses of discussion, has been made. He cannot avail himself, at any rate, of this plea, as the property is not situated within the jurisdiction of the tribunal of the place, where the payment was to have been made.

Brownson, contra.

Martin, J., delivered the opinion of the court.

The Civil Code of 1808, art. 44, p. 462, and art. 10, p. 430, provides, that the third possessor of mortgaged property, who is not personally liable for the debt, may require the property in the possession of the principal debtor to be first discussed and sold before coming on him, if the property of the debtor is not situated in too distant a part of the state.

The only question which this case presents, is whether a person, who between the year 1808, and the time of the promulgation of the *Code of Practice*, purchased land, affected by a tacit or legal mortgage, may require the discussion of a tract of land, still in the possession of his vendor, lying in any part of the state.

According to the Code of Practice, art. 72, the discussion of property not situated within the jurisdictional limits of the tribunal where payment is to be made, *is disallowed.*

According to the Civil Code of 1808, article 44, page 462, and page 430, article 10, the third possessor of mortgaged property, not personally bound for the debt, may resist the attempt to sell the land or property in his possession, until the land or property in the possession of the principal debtor, within the state, be first discussed, *unless in too distant a part of the state. Civil Code, p.* 434, *art.* 26.

The provisions of the Code of Practice, limiting the right of discussion to property situated within the jurisdiction of the tribunal of the place where payment is to be made, does not apply to contracts made before its enactment.

According to the provisions of the Code of Practice, article 72, the discussion of land or property, *not situated within the jurisdiction of the tribunal, of the place where payment was to have been made, is disallowed.*

The effect of laws is generally prospective; and if they have a retrospective effect in any case,

It is clear to the court, that this provision, of the Code of Practice, cannot affect the rights, resulting from contracts, entered into before its enactment. The effect of law is gen-

erally prospective. If it may be retrospective in any case, the intention of the legislature must be evident, and cannot command obedience to its will, when the law cannot be executed, without affecting the obligation of contracts, theretofore entered into.

the intention of the legislature must be evident and clearly expressed. It cannot command obedience to laws affecting the obligation of contracts entered into before their passage.

The District court correctly sustained the plea of discussion, in this case; and although the land required to be discussed, was not shown to be situated within the jurisdictional limits of the place in which the payment of the money due, was to be made, but in an adjoining parish, yet the defendant and third possessor, is shown to have bought the land seized, several years before the promulgation of the Code of Practice.

It has been further objected, that no money was paid in, or tendered, when the plea of discussion was filed; but it appears, the District Court directed the deposit in the clerk's office, of a sum of money, to cover the expenses of the discussion and the deposit was made accordingly. This we think was sufficient.

It is not necessary that the money required to defray the expenses of discussion of property, be tendered at the time of filing the plea; it is sufficient if the money be deposited in court in pursuance of an order directing it to be done within a specified time.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

SAVOIE *vs.* IGNOGOSO.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

A suit for a separation from bed and board, is in the terms and meaning of the law, an *action of divorce.*

The exception to the general rule of evidence contained in the 2260th article of the La. Code, by the third section of the act of 1827, relative to divorces, is not restricted to either species of divorce, but applies to both.

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The action of separation from bed and board, in all cases, leads to a divorce *a vinculo matrimonii.*

So in a suit for a separation from bed and board, by the wife against the husband, with a view to a divorce, the children of the plaintiff, both majors and minors, are competent witnesses to testify in her behalf.

This is an action for a separation from bed and board, *and a divorce*, instituted by the plaintiff against the defendant, her husband, on account of cruel treatment, excesses, outrageous conduct towards her, and hatred and neglect of her, to such a degree as to render living together insupportable. She alleges that the defendant has received large amounts of her property, and that of her children, which they inherited, and her portion of the community which existed between her and her *late* husband; and she fears the said defendant intends to leave the state, without returning, or giving up, or paying for said property; she, therefore, prays for an injunction, to restrain and compel him to deliver up said property, &c.; "and that she be entirely separated in bed and board and in property from the said defendant, and restored to the full administration of the same, &c.": "and she represents that the present suit is brought *with a view to an ultimate divorce after the time fixed by the law relative to divorces, &c.*"

The defendant pleaded a general denial; admitted the marriage, but alleges he has always treated the plaintiff kindly, and if ever any dispute arose between them, it was of a very trifling nature: He charges that his wife has left him and commenced this suit without any just cause, and as he believes, at the instigation of some person, who has intermeddled in his domestic affairs. He prays that her demand be rejected, &c.

On an application of the plaintiff in a supplemental petition, she had her daughter's house and home assigned as her residence during the pendency of the suit, with an allowance of thirty dollars per month for her board, to be paid monthly in advance by the defendant.

On the trial, the plaintiff's counsel under the provisions of the act of 1827, relative to divorces, called several of her children by her first marriage, both majors and minors, as

witnesses to prove the allegations in her petition, relative to cruel treatment of herself and her children by defendant, and of his being guilty of excesses and outrages of such a nature as to render their living together insupportable. The defendant's counsel objected to the admission of the witnesses, as incompetent on the ground of their relationship to the plaintiff, which objection was sustained, and the plaintiff's counsel took his bill of exceptions.

The jury on hearing the other testimony adduced by the parties, returned a verdict for the defendant. After an unsuccessful attempt to obtain a new trial, and judgment being rendered in conformity to the verdict, the plaintiff appealed.

Bowen for the plaintiff.

Lewis for the defendant.

1. Plaintiff's children cannot be witnesses on her behalf, unless the action be one of divorce.

2. The act authorising the children of parties to actions of divorce to testify, is in derogation of the general law of evidence and must be strictly construed.

3. This is only an ordinary action for a separation from *bed and board*, and a new suit must be instituted, to obtain a divorce. *La. Code*, 2260, *acts*, 1827, *p.* 130.

Simon on same side.

1. Contended that the new rule of evidence, introduced by the third section of the divorce act of 1827, in which descendants and ascendants were made competent witnesses for each other, only applied in cases of divorce.

2. This is a suit for a separation of bed and board, and not an action of divorce, consequently the provisions of the divorce act, relative to the rules of evidence, do not apply.

3. The suit for a separation of bed and board must first be decided, and a separation obtained, before an action of divorce can be commenced. It is only in the latter suit, that the children of the plaintiff can be called as witnesses.

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Mathews J., delivered the opinion of the court.

This is a case in which a wife claims a divorce from her husband, in pursuance of the provisions of the act of the legislature, passed in 1827, in relation to the separation of married persons.

The petitioner claims a separation of property, and divorce from bed and board, on account of excesses, cruel treatment, and outrages committed on her by her husband; alleging that her intention is to obtain finally, a divorce from the bonds of matrimony.

To prove the alleged outrages, she offered as witnesses some of her children, who were excepted to as incompetent, and the exception was sustained by the court below; and to the opinion by which these witnesses were rejected a bill of exceptions was taken, &c. Judgment was rendered against the plaintiff, from which she appealed.

The examination of this bill of exceptions requires from this court (for the first time) an interpretation or construction of the act of the legislature, on which this action is founded. The only question, however, for solution, relates to the competency of witnesses to testify for or against their ascendants or descendants. As a general rule, they are rendered incompetent by the art. 2260 of the Louisiana Code, and unless an exception to this rule be found in the act under consideration, the judge *a quo* acted correctly in rejecting the witnesses offered on the part of the plaintiff, in the present case.

The causes for which divorces may be claimed, as specified in the law, are adultery, excesses, cruel treatment or outrages, condemnation to an ignominious punishment, and abandonment. These causes are all laid down in the eleventh section of the act. The second establishes the tribunals for the trial of cases in which divorces are claimed: And the third provides that "all actions of divorce shall be tried as all other cases, *provided*, that no witness summoned by the parties, shall be declared incompetent under the pretence of their being the allies or relations of either plaintiff or defendant.

If these sections of the law stood alone, no doubt could be entertained of the section last cited, enacting an exception to

the general rule of competency established in relation to ascendants and descendants: Otherwise the proviso will be without effect. But the fourth section of this act, is expressed in the following terms: "Except in cases where the husband or wife may have been sentenced to any infamous punishment, or convicted of adultery, as provided for in the first section of this act, no divorce shall be granted, unless a judgment of separation from bed and board, shall have been previously rendered between the parties, and unless two years shall have expired from the date of the judgment of separation from bed and board, and no reconciliation may have taken place; *provided*, that in the cases excepted above, a judgment of divorce may be granted in the same decree, which pronounced the separation from bed and board.

This section, unless its provisions be clearly contrary to those of the preceding sections, cannot, according to any just interpretation of laws, abrogate the rules established by them. The meaning and tenor of the whole law, taken together, appears to us to be applicable to either species of divorce, as well that which goes no farther than a separation from bed and board, in its primary effects, as that which at once dissolves the bonds of matrimony. The former is as complete a separation of the parties to the matrimonial engagement as the latter, with the exception that no new marriage of either could be legally made. The claim of separation from bed and board, is in the terms of the law, an action of divorce, and the exception contained in the proviso of the third section, to the general rule of evidence established by the Code, is not restricted to either species of divorce; it therefore, embraces both. The action of divorce, which has for its object a separation from bed and board, will, in all instances, tend to a final and absolute discharge of the *parties ab vinculo matrimonii*, and leads directly to that result, in the event of no reconciliation, within the time limited by law. The first intention of the legislature, seems to be an offer of relief to the injured party, from outrages repugnant to the feelings of humanity, and ultimately to place the sufferer in a situation to form a more congenial matrimonial connection. But, if

A suit for a separation from bed and board, is, in the terms and meaning of the law, an *action of divorce.*

The exception to the general rule of evidence contained in art. 2260 of the La. Code, by section 3 of the act of 1827, relative to divorces, is not restricted to either species of divorce, but applies to both.

The action of separation from bed and board, in all cases leads to a divorce *a vinculo matrimonii.*

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the construction assumed by the court below, be adopted, a principal means of arriving at the final result, contemplated by the legislature and authorised by the law, will be rendered void and utterly unavailing. By allowing the parties an opportunity for reconciliation, we do not believe that the law makers intended to destroy the means of relief previously held out to a suffering husband or wife.

So in a suit for a separation from bed and board by the wife against the husband, with a view to a divorce, the children of the plaintiff, both majors and minors, are competent witnesses to testify in her behalf.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and that the cause be remanded to said court, to be tried *de novo*, with instructions to the judge, to permit the children of the plaintiff, to testify in this case. And it is further ordered, that the appellee pay the costs of this appeal.

MELANÇON'S HEIRS *vs.* DUHAMEL ET ALS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where judgment of eviction is obtained, against the purchaser of a tract of land, while suit is pending for the price, and the purchaser calls the plaintiffs (his vendors) in warranty, to protect his title, and at the same time pleads the eviction, asks a rescission of the sale, and a discharge from the contract; when there is no evidence of an actual dispossession or ouster of the defendant, either forced or voluntary, the plaintiffs will recover the *price*, on preventing the execution of the judgment of eviction, by tendering to the defendants and vendees, a renunciation of all the benefits and advantages under it, by the person who obtained it.

The execution of a contract, according to its terms, and the intentions of the parties, is more consonant to justice, law and equity, than the rescission of it, and a condemnation in damages, when the contract remains entire, and there is no change in the situation of the parties.

This action was originally commenced, to recover the price of a tract of land, sold at the probate sale of Melançon's estate, and purchased by the defendant Duhamel. The suit was instituted against Duhamel, and Latiolais, his surety. Before judgment, Duhamel was evicted of a large portion of the land, by Pierre Broussard. The defendants now pray for a rescission of the sale, and to be discharged from the contract. Duhamel being dead, the suit is continued by the curator of his estate, and his surety. The case has been several times before this court. See 4 *La. Reports*, 362.

On the return of the case to the District Court, at the October term, for the parish of St. Martin, in 1832, the district judge being of opinion, that the eviction pleaded by the defendants was fully proven, that they were entitled to have the sale of the land, for the price of which they were sued, rescinded, gave judgment, annulling and cancelling the sale, and discharging the defendants from all liability under said contract and sale.

The plaintiffs relied on the act of renunciation, executed by Broussard, in which the latter renounced the benefit of the judgment of eviction he had obtained against Duhamel, and abandoned all the advantages resulting therefrom, to the plaintiffs in this suit. See 2 *La. Reports*, 8.

Judgment being rendered against the plaintiffs, they appealed.

Brownson, for the plaintiffs, said this case would depend mainly, on the effect given to the act of renunciation of Broussard. These plaintiffs having been called in warranty, by the defendants, when the latter were sued by Broussard; although judgment of eviction was pronounced in his favor, yet the tender to the defendants, of a complete and full renunciation by Broussard, of the advantages arising from said judgment, renders them completely secure in their title, and the case stands as if no eviction had happened.

2. The defendants never abandoned the land, nor were they ever turned out of possession by Broussard; they must

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be considered as purchasers in possession, secure in their title, and bound for the payment of the price.

Simon, contra.

Martin, J., delivered the opinion of the court.

This case has been several times before this court. It becomes necessary to go back to the original contract, which gave rise to these proceedings, for a full understanding of the case. Duhamel purchased a tract of land, at the sale of the property of Melançon's succession, in 1819, and gave defendant Latiolais as his surety. The purchase money was payable on a credit, by instalments. On suit being brought against the defendants, for one of the instalments then due, they pleaded, that one Broussard had commenced a suit against them, for the same land, and that they were in great danger of eviction. They further alleged, that the plaintiffs ought to be called in warranty, and as having sold what was not their own, the sale ought to be cancelled, in case Broussard succeeded in obtaining judgment, and that damages should be awarded them.

The plaintiffs replied, that they were ready to give security, for the validity of Duhamel's title to the land in question. The court ordered the security to be given, before the parish judge. The record does not show, whether such security was actually given; but at a subsequent term, the defendants filed an amended answer, in which they allege, that Broussard's suit had been prosecuted to a successful termination, in the Supreme Court; the consequence of which was, that Duhamel was evicted of three and a half arpents, of the tract of five arpents, which he had purchased at the probate sale of Melançon's succession. They further averred, that Broussard had taken possession of the land he had recovered, which formed so considerable a portion of the original purchase, by Duhamel, that he would not have purchased the land, if he had known that he did not acquire a good title to the whole tract. The answer concluded by a prayer,

for the rescission of the sale; that the notes given for the price of the land, be cancelled and returned to the defendants, and that they recover the sum of five thousand dollars, for damages sustained by them. Five years after the filing of this amended answer, (during which period this cause was continued) the plaintiffs filed an amended petition, in which they alleged, that they had already obtained a final judgment, for the first instalment of the price, which was in force and unsatisfied, and which precluded the defendants from any right to demand the rescission of the sale; that Broussard's suit had been instituted at the instigation, and by the procurement of Duhamel, for the sole purpose of enabling him to claim the rescission; and further, that Broussard was induced to commence his action, by the promise of Duhamel's attorney, that he should be at no expense or costs, in its prosecution, if it should be ultimately decided against him. They further showed, that Broussard's attorney, about the time of the first trial of this cause, obtained possession of the original book of surveys, made by Gonsoulin, containing the *procès verbal* of the survey of the land in dispute, and agreed to by Broussard, who consented to the location, as contended for by the defendants; and that since the judgment of the Supreme Court, Broussard had by an act *sous seing privé*, dated the 21st January, 1827, renounced all benefit and advantage resulting from said judgment, in favor of the defendant Duhamel, and had confirmed the same in favor of the title acquired by him. The plaintiffs tender the renunciation of Broussard to the defendants, alleging, at the same time, that they have never been really evicted.

The defendants excepted to the filing of this amended petition, on the ground, that it changed the nature of the action, as originally brought by the plaintiffs; that it was not, in fact, an amended petition, but an attempt to institute, indirectly, an action of nullity on the judgment of the Supreme Court; or a replication to the defendant's answer, setting up that judgment as a bar to the plaintiffs' action. A bill of exception was taken to the opinion of the court, permitting the amended petition to be filed.

In the answer to this amended petition, the defendants repeat the same objections, and further allege, that the judgment in favor of Broussard, in the Supreme Court, had been ordered to be executed, and that the land had actually been taken from the defendants, before the renunciation of Broussard, in consequence of which, the defendants had acquired a right, which could not be affected by the subsequent act of one of the parties.

Where judgment of eviction is obtained against the purchaser of a tract of land while suit is pending for the price, and the purchaser calls the plaintiffs (his vendors) in warranty to protect his title, and at the same time pleads the eviction, asks a rescission of the sale and a discharge from the contract; when there is no evidence of an actual dispossession or ouster of the defendant, either forced or voluntary, the plaintiffs will recover the *price*, on preventing the execution of the judgment of eviction, by tendering to the defendants and vendees a renunciation of all the benefits and advantages under it by the person who obtained it.

The defendant Latiolais, the surety, in a separate answer, averred, that in consequence of the facts and circumstances alleged, in the original answer, and in the subsequent ones, he had been legally discharged from all liability, resulting from his suretyship, and that none of the allegations in the amended petition, could affect him, as by the act of the plaintiffs, the subrogation to their right, privilege and mortgage, could no longer be made to operate in favor of Duhamel.

The District Court sustained the defence, and decreed a rescission of the sale. The plaintiffs appealed.

The bill of exception taken, to the admission of the amended petition, was acted on when this case was last before this court. See 4 *La. Reports*, 362.

The record contains no evidence of an actual dispossession or ouster of Duhamel, either forced or voluntary. The present plaintiffs being called in warranty, to defend their vendee, in the opinion of this court, fully answered the call, by preventing the execution of the judgment of Broussard, and giving to their vendee, an absolute protection against the consequence of the judgment.

The execution of a contract according to its terms and the intentions of the parties, is more consonant to justice, law and equity, than the rescission of it, and a condemnation in damages; when the contract or matter is still entire, and there has been no change in the situation of the parties.

The execution of a contract according to its terms and the intentions of the parties, is more consonant to justice, law and equity, than the rescission of it and a condemnation in damages; when the con-

Had the judgment in favor of Broussard, been followed by the execution of a writ of possession, or had Duhamel voluntarily executed it, by abandoning the premises, his claim against his vendor, would have been perfect, and the latter

could not have escaped from the consequences of the ouster of his vendee; and if the vendee, notwithstanding he had neither been formally ousted, nor relinquished his possession, could show, that on the judgment of Broussard being signified to him, he had taken measures to provide against its consequences, as by the purchase of another tract, so that the matter was not *res integra*, we are not even prepared to say, that he might not have successfully claimed relief against his warrantors.

tract remains entire and there is no change in the situation of the parties.

It may be said, that the judgment in favor of Broussard, affected the land recovered, with any general mortgage that may have existed on his property; that Duhamel contracted for Melançon's title, and not for that of Broussard. To the first part of the objection, it is a sufficient answer, that *de non apparentibus et de non existentibus eadem est lex;* and that he, whose claim is grounded on the apprehension of demands from creditors, with a general mortgage, ought to show that a general mortgage exists. To the second part, an equally successful answer can be made. For, that even after a decision, that the plaintiffs, by procuring Broussard's renunciation, have complied with their obligation to warrant and defend Duhamel's title, they shall not be absolved from the obligation of defending it, in case any person claiming under Broussard, or as his mortgage creditors, should disturb the heirs of Duhamel in their possession.

Broussard's renunciation, at any time before he obtained the judgment against Duhamel, would have disabled the latter from resisting the claims of the plaintiffs. His renunciation of that judgment, does not appear to this court, less efficient; and if it ever should prove insufficient, the remedy of Duhamel or his heirs, against his vendors, will be the same. Should he show, that there is room for apprehension, he might guard against its consequence, by a demand of security.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and proceeding to give such a judgment, as in our

opinion, ought to have been pronounced, in the court of the first instance, it is ordered, adjudged and decreed, that the plaintiffs recover from the defendants, the sum of three thousand and eighty-five dollars, with legal interest, from the time the instalments became due; and that the land be first seized and sold, to satisfy said judgment, before the judgment, or any part thereof, be claimed from the defendant Latiolais: the defendants paying costs in this court.

ROBIN ET ALS *vs.* CASTILLE.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The heirs of the deceased wife, who dies without leaving descendants, have a right at once to demand her paraphernal property, without waiting for a settlement and liquidation of the community of acquests and gains, with the surviving husband.

The wife, during the existence of the community, has a right to resume the administration of her paraphernal property.

When the wife dies, *her heirs* are seized of all the effects, constituting her separate estate, from the moment of her decease.

Money received by the husband during marriage, on account of his wife, does not fall into the community, but remains her separate property.

This is an action by the plaintiffs, who are the father, and brother and sisters, of Aimé Robin, deceased, late wife of the defendant, J. B. Castille, to recover from him two sums of money, of seven hundred and thirty-nine dollars, and seven hundred and thirty dollars, which he received as portions, during marriage, inherited by his said wife from her grandmother. The defendant gave his two receipts, dated in 1829 and 1830, for said sums of money. His wife afterwards died, without leaving any descendants, and the

plaintiffs being the only surviving legitimate heirs, claim these sums, with a legal mortgage on all the defendant's property, for their re-payment, amounting in all to one thousand four hundred and sixty-nine dollars.

The plaintiffs pray judgment against the defendant, for said sum of money, with legal interest thereon, and that they may be decreed, to have a legal mortgage on all his lands and slaves, from the several periods when said sums of money were received by him.

The defendant pleaded a general denial; that the plaintiffs accorded him, by an act signed before a justice of the peace, one and two years, to pay whatever sums he might owe them, wherefore this action is premature, and ought to be dismissed. He further alleged, that a community of property existed between him and his late wife, to which the plaintiffs have never renounced, but have accepted it purely and simply; that the community has not been settled, and the plaintiffs cannot set up any right or claim against him, until a final settlement is had; that the community owes a number of debts, and is subject to many charges, to which the plaintiffs ought to contribute, and which cannot be ascertained, until a liquidation and regular settlement takes place; and that when a settlement is had, he will not be found indebted, or if he owes any thing, it is very small; and that the plaintiffs have no right to proceed in this suit; he prays that their demand be rejected, &c.

The plaintiffs introduced in evidence, in support of their demand, the two receipts set out in their petition, and given by the defendant, for the money sued for, with proof of their execution.

The defendant introduced the inventory and proceedings in the Probate Court, had in relation to his wife's succession. The inventory of her property, as taken by the parish judge of St. Martin, amounted to only one thousand one hundred and ninety-nine dollars, besides a few small debts.

The district judge gave judgment for the amount of the plaintiffs' claim, with interest, and mortgage on the defendant's estate, until final payment. The defendant appealed.

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Lewis, for the plaintiffs.

1. Plaintiffs, as heirs of defendant's deceased wife, have a right to sue for and recover from the defendant, the amount of her paraphernal property, received by him, *without previously* renouncing the community between them.

2. The simple fact of not renouncing, does not amount to an absolute acceptance of said community. They might be called on to accept or renounce, and in that event only, are they bound to decide, which they will do. *La. Code*, 2383 *and* 2379.

3. Even if plaintiffs had accepted the community, still defendant is bound to account to them for the paraphernal rights of his wife, and the rights of the parties in the community remain as they were before instituting this suit.

Simon, for the defendant, contended, that the heirs of the deceased wife could not sue the surviving husband for her interest in the community, until it is settled and the debts paid off.

2. The heirs cannot sue until they renounce the community of property belonging to the deceased wife. Until this is done, which has not been done here, they cannot recover back her dotal or paraphernal effects. *La. Code*, 2379, 2380 *and* 2381. 4 *Favarde*, 884.

Bullard J., delivered the opinion of the court.

The plaintiffs sue as heirs at law, of the deceased wife of the defendant, for the sum of one thousand four hundred and sixty-nine dollars, received by him during the marriage, as the share of his wife, in the succession of her grandmother, and which constitute her paraphernal estate. The defendant resists their claim, on the plea, that there existed between him and his late wife a community of acquests and gains, which the plaintiffs have never renounced, but which on the contrary, they have accepted purely and simply; that the community has never been in any way settled, nor partaken between him and the plaintiffs; that it is only in settling the community, that the rights of the parties against it, can be

ascertained and liquidated, and that the plaintiffs have no right to set up any claim against the respondent, until the said community is brought to a final settlement; that the plaintiffs are bound to pay one-half of the debts of the community, and that on a fair settlement, it will be found, that the defendant is not indebted to the amount claimed.

The heirs of the deceased wife, who dies without leaving descendants, have a right at once to demand her paraphernal property, without waiting for a settlement and liquidation of the community of acquests and gains with the surviving husband.

This exception presents, for the consideration of the court, the question, whether the heirs of the wife have a right, at once to demand her paraphernal property, without waiting for a settlement and liquidation of the community of acquests and gains. The argument in support of the negative of that proposition, goes to assume as a principle, that money received by the husband during the marriage, on account of his wife, is mixed and blended with the property composing the community, and forms a charge upon it, rather than a debt due by the husband. And yet it is admitted, that the wife, on renouncing the community, has a right to claim her paraphernal property. The 2380th article of the Louisiana Code, declares that "the wife who renounces, loses every sort of right, to the effects of the partnership or community of gains. But she takes back all her effects, whether dotal, extra dotal, hereditary or proper." The counsel for the appellant infers from this article, that it is only on her renunciation, that she has a right to take back her paraphernal estate. This reasoning is not satisfactory to this court. Such a principle would be inconsistent with certain well settled doctrines of our law; 1st, That the wife herself, even during the existence of the community, has a right to resume the administration of her paraphernal property; and 2d, That constituting her separate estate, her heirs are seized of it, at the moment of her decease. If instead of money, the husband had received property, still existing in nature, the heirs would undoubtedly have been entitled at once, to the possession of it. Indeed the converse of the proposition, contained in the article of the Code above cited, cannot be correct; to wit: that if the wife does not renounce, she shall not take back her separate estate, because the only consequence of accepting the community, is to render her liable for one-half of the debts.

The wife during the existence of the community, has a right to resume the administration of her paraphernal property.

When the wife dies, *her heirs* are seized of all the effects constituting her separate estate, from the moment of her decease.

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Money received by the husband during marriage on account of his wife, does not fall into the community, but remains her separate property.

The authorities cited from French commentators, refer to a system different from that established by the Louisiana Code. It is believed, that under the Code Napoleon, a sum of money received by the husband on account of his wife, during marriage, belongs to the matrimonial community, and consequently is affected to all the charges upon it, and could only be accounted for to the heirs on a final liquidation and settlement of the community. By our Code, it is different; money so received, does not fall into the community.

But it is contended, that the heirs of the wife in this case, are bound to pay one-half of the community debts, out of her separate estate, and that consequently, they ought not to be permitted to withdraw this fund from the hands of the surviving husband, until the debts shall have been paid. Whether the heirs be bound to pay the debts, is in our opinion, a question between them and the creditors. The husband is, at all events, liable for the whole, and a partition of the community cannot be made, without provision for them; but it does not, in our opinion, follow that the husband is authorised, after the dissolution of the marriage, to retain the paraphernal property of his deceased wife.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

KEY *vs.* WALKER.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The record of a suit between other parties, evicting the third possessor, is legal evidence in an action by the third possessor against his vendor, to prove the fact of eviction and the damage sustained by him in consequence thereof.

Where the petition alleges the plaintiff was evicted by a certain suit between two other persons, and refers to it by name and description, it is a sufficient allegation to authorise the admission of such record in evidence, in an action against the vendor for damages.

It is not necessary that the defendant, who is the vendor sued, had notice of a suit and proceedings evicting his vendee, to authorise the admission of those proceedings in evidence against him. That matter may go to the effect of the evidence, but not to its admissibility.

This is an action of warranty to recover damages of the defendant in consequence of eviction from a tract of forty superficial arpents of land.

The plaintiff purchased of the defendant by public act, dated the 1st of June, 1831, a tract of forty supercial arpents with warranty of title, and also all the defendant's *right of settlement* to the balance of one hundred and sixty arpents, for the sum of six hundred dollars in cash.

Shortly after this sale, Alexander Lewis obtained an order of seizure and sale, against the tract of forty arpents, on his mortgage against one Henry R. Nerson, from whom the defendant had purchased it, and had the land sold, by which the plaintiff was evicted.

He now brings his action of warranty to recover back the sum of six hundred dollars with interest, which he had paid to the defendant; and also, prayed for and obtained an attachment against four slaves belonging to the latter, on an

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allegation and affidavit, that the defendant was about to remove permanently from the state.

In his petition, the plaintiff alleges his eviction, and "that the land has been sold by Alexander Lewis, to satisfy his said mortgage, which will more fully appear, by reference to an act of seizure and sale, granted by the honorable judge of the District Court, *and on the files of said court*," *&c.*

The defendant, by written motion, moved to dissolve the attachment on the ground, that it was not true he was about to leave the state, &c.

On the merits, the defendant pleaded a general denial; admitted the sale of the land, but alleged that the consideration expressed therein, of six hundred dollars, was not for the forty arpents mentioned in the petition, but was for said forty arpents, and also, one hundred and sixty other arpents of land, adjoining the said forty arpents, and he only warranted the forty arpents, and sold to the plaintiff his right of settlement for the said one hundred and sixty arpents without warranty. He alleges that there were valuable improvements on the last tract, which were also included in said sale, and which were reasonably worth five hundred dollars. He denies that the plaintiff is entitled to recover any sum from him, by reason of his illegal and vexatious conduct in suing out his attachment, which he alleges was wrongfully sued out, and under false pretences, with a view to harrass defendant's property, &c.; and that by attaching and detaining four of his slaves, he has sustained damages to the amount of five hundred dollars, for which he claims judgment in reconvention, and prays that the plaintiff's demand be rejected, &c.

The motion to dissolve the attachment was sustained, and the cause referred to a jury for trial on the merits.

A witness for defendant by the name of Walker, declares on oath, that the plaintiff seized a negro woman and two children, and a negro boy, under his attachment, which were taken out of defendant's possession, in consequence of which he had to break up house-keeping, and sustained much loss in furniture and stock.

Bendy, a witness for plaintiff, swears defendant had but little furniture or stock. Heard defendant say he was going to move his cattle to Texas, and that he was going there himself. Witness was under the impression he intended to go.

On the trial, the plaintiff offered in evidence, "the record of an order of seizure and sale, and all the proceedings had thereon, of Alexander Lewis, against Henry R. Nerson, which his counsel declared he intended to prove thereby, and by other evidence, that the plaintiff had been evicted from the land purchased from the defendant, in consequence of a mortgage existing on it in favor of Lewis, at the time of the purchase, &c. The evidence was objected to, and the objection sustained, and a bill of exceptions taken to the decision of the court.

The jury returned a verdict, on hearing all the other evidence in favor of defendant's claim in reconvention, of thirty-eight dollars and sixty-one cents. Judgment being rendered thereon, the plaintiff appealed.

Brownson for the plaintiff.

Lewis for the defendant.

1. New trial was properly refused, because the case does not come within any of the rules established by the Code of Practice, art. 560.

2. There is no *legal* evidence of misconduct in the jury.

3. The jury had a right to make up their verdict as they did. 4 *Johnson's Reports*, 487.

Mathews, J., delivered the opinion of the court.

This is an action of warranty, in which damages are claimed on account of an alleged eviction from a certain tract of land, sold by the defendant to the plaintiff, &c.

The suit was commenced by attachment. The defendant afterwards appeared and answered, and filed a plea in reconvention. The cause was submitted to a jury in the court below, who found a small sum in favor of the reconvenor, and judgment being thereon rendered, the plaintiff appealed.

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A bill of exceptions is found on the record to an opinion of the judge *a quo*, by which he rejected the record of a suit which was in the nature of an action of mortgage, brought by one Alexander Lewis against a certain Henry R. Nerson, on which an order of seizure and sale was obtained and executed, on a tract of land in the possession of the plaintiff as purchaser from the defendant, &c.

The record of a suit between other parties, evicting the third possessor, is legal evidence in an action by the third possessor against his vendor, to prove the fact of eviction and the damage sustained by him in consequence thereof.

Where the petition alleges the plaintiff was evicted by a certain suit between two other persons, and refers to it by name and description, it is a sufficient allegation to authorise the admission of such record in evidence, in an action against the vendor for damages.

It is not necessary that the defendant, who is the vendor sued, had notice of a suit and proceedings evicting his vendee, to authorise the admission of those proceedings in evidence against him. That matter may go to the effect of the evidence, but not to its admissibility.

This evidence was rejected on several grounds: 1st. As being *res inter alios acta*. 2d. Because its introduction is not authorised by the allegations of the petition; and, 3d. Because no knowledge of the proceeding was brought home to either plaintiff or defendant in the present suit.

We are of opinion that the court below erred, in rejecting the evidence offered. It is a record of proceedings in pursuance of which the property in the possession of the plaintiff, held under title from the defendant, was sold, and is certainly good and legal evidence to prove *rem ipsam;* a fact clearly necessary to support the allegations in the petition. Whether it be conclusive to establish such an eviction as would authorise the present action of warranty on the part of the appellant, is a question different from that which relates to the legality or admissibility of the testimony offered. The petition, although, perhaps, not drawn up with the greatest possible precision and technicality, appears to us to have sufficient reference to the fact offered to be proven by the record adduced, to authorise its admission. Whether Walker, the defendant, had or had not knowledge of that proceeding, is a matter that may have its effect in a trial of the cause on its merits; but, according to the view which we have taken of the subject, cannot legally influence the question of admissibility.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided, reversed and annulled, and the verdict of the jury set aside; and it is further ordered, that the cause be remanded, with directions to said court to permit the record, &c. to be given in evidence. The appellee to pay the costs of this appeal.

PATIN ET ALS *vs.* PREJEAN ET ALS.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The Code of Practice has re-enacted the same general rules, in relation to the discussion of property by creditors, having a general mortgage on the property of their debtors, as was provided by the act of 1817, requiring them to proceed against the property last alienated, and ascending towards that first sold, until their claims be satisfied.

A right or title, acquired under a contract, cannot be modified or affected by any subsequent act of the legislature; but the remedy or means given by law, to enforce those rights, are always in the power of the legislature, who may extend or restrict them, as circumstances may require.

The means by which a minor's rights, against the property of his tutor, are to be enforced, are always in the power of the legislature. In requiring him to discuss property last alienated, before coming on that previously sold, although the law was enacted after his mortgage attached to the property of his tutor, yet it was in the power of the legislature to pass it.

The plaintiffs allege, that they obtained a judgment against their father and natural tutor, Marcel Patin, on the 10th day of September, 1825, for two thousand four hundred and thirty-six dollars twelve cents, being eight hundred and twelve dollars four cents, in favor of each of them, with legal interest, on the claim or portion of each, from certain dates, and with a legal mortgage on all their father's property, which he owned and possessed, at any time since the 15th day of July, 1812, the date of the natural tutorship.

In October, 1828, the syndics of Marcel Patin, who had became insolvent, presented a tableau of distribution of his estate, among his creditors, which was homologated, on which the plaintiffs were placed, for the aggregate sum of nine hundred and twenty-eight dollars sixty-nine and three-fourth cents, leaving still a balance of two thousand and

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forty-nine dollars, on said judgment, against their father, unpaid. They allege, they have made an amicable demand on the syndics, for the balance of their debt; who replied there was no more property or funds of said estate in their hands.

The plaintiffs further allege, that their said father was owner of a plantation, now in the possession of the widow Prejean and heirs of N. Thibodeau, which was alienated by him, in 1814; that he was owner of a negro man Harry, now in the possession of Martin Sudrique, who was sold by him, in 1823; and that he was owner of a negro woman Françoise, and her child, now in possession of Valery Martin, which he sold in August, 1823; all of which property, the plaintiffs charge to be subject to their legal mortgage, as having been alienated since the mortgage began to exist, and that it is liable to the payment of their respective claims. They pray that these parties be cited, to show cause why the said property shall not be seized and sold, to satisfy the balance of the aforesaid judgment, with interest and costs.

The defendant, widow Prejean, and as tutrix of the minors Thibodeau, pleads a general denial; and alleges, that the plaintiffs are bound to prosecute their claim (if any they have) against the mortgaged property last sold, and ascending to that first sold; she alleges a sale of an undivided tract of land, by Marcel Patin, in November, 1819, and another tract, sold in November, 1820, all of which, together with the other property sued for, she prays may be first discussed and proceeded against, before coming against the plantation in her possession; she prays the court to fix the amount of the sum she is to pay, to carry on the discussion, and tenders it in open court.

Sudrique answered, reserving his right to dispute the plaintiffs' claim, and alleged, that the plaintiffs were bound to proceed against the negro woman Françoise and her child, in the possession of Valery Martin, as being last sold, before coming on him.

Martin answered, and pleaded a general denial; he denied specially, that Marcel Patin was tutor of plaintiffs, or that

any mortgage existed on the property in his possession; he denies that the plaintiffs are entitled to any thing, as heirs of their mother; that after the death of their mother, the community which had previously existed between her and their father, *was continued*, and was administered by the father, for the benefit of all the parties concerned; that during its continuance, debts were contracted, and property purchased, in the name of the father; that among the debts contracted, there was one in favor of the Louisiana State Bank, one in favor of M. White, and one in favor of F. Breaux, on which judgments were obtained and executions issued, and on the 28th of August, 1823, a negro girl named Françoise, and her child, were seized and sold, when the defendant became the purchaser, for five hundred and thirty-five dollars, subject to the payment of two hundred and five dollars, with interest, and a special mortgage in favor of A. Guidry, which he has paid; he further alleges, that the property so purchased by the said Marcel Patin, was acquired by him, subsequent to the death of the plaintiffs' mother, and was liable to the payment of said debts; and that the plaintiffs have received from their father, various articles of property, for which they have given no credit; that the community of property continued, until after the purchase of the negro woman and her child; and which was sold as community property to pay community debts, for the payment of which the plaintiffs were also bound. He prays that the plaintiffs' petition be dismissed, &c.

On these issues the cause was tried at the April term, 1832, of the St. Martin's District Court. The plaintiffs produced in evidence, the judgment in the Probate Court, against their father, in which they recovered the amount now claimed, after deducting a small credit.

The defendants introduced in evidence, two acts of sale, made of two tracts of land, in 1819 and 1820, which were required to be discussed, in the answer of the widow Prejean, before proceeding against her.

The district judge being of opinion, the plaintiffs were entitled to the amount of the judgment claimed, in their

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petition, against the defendants, Sudrique and Martin, and that they were bound to discuss the property in their possession before coming against the property of the other defendants, ordered, that the negro woman and her child, in the possession of Martin, and the negro man Harry, in possession of Sudrique, be seized and sold, to satisfy the plaintiffs' demand, and that the cause be continued as to the other defendants.

The sheriff returned an account of sales, of the slaves ordered to be seized and sold, by which it appeared they sold for seven hundred and forty dollars, still leaving a large balance of plaintiffs' judgment unsatified.

At the November term, 1833, of said court, the trial of this cause proceeded. Judgment was rendered on the evidence already introduced, when it was ordered and decreed, that the proceedings against the property, in the possession of the widow Prejean, be suspended, until the plaintiffs have discussed the two tracts of land, sold in 1819 and 1820, by the plaintiffs' father, and now in the hands of third possessors; and that the defendant, widow Prejean, pay into court the sum of seventy-five dollars, within thirty days from the date of the decree, to defray the expenses of the discussion, and on failure, to be forever barred from requiring or setting up said discussion. From this decree the plaintiffs appealed.

Simon, for the plaintiffs.

Brownson, contra.

Martin J., delivered the opinion of the court.

The plaintiffs seek to obtain payment of a judgment, which they have obtained against their late tutor, by the sale of a tract of land, sold by him. The attempt is refuted by the defendants, who point out another tract, sold by the tutor, after he had sold that in the possession of the defendants. The plaintiffs contended, that as their tutor had sold the tract, in the possession of the defendants, before the year

1817, the latter could not avail themselves of the act passed in that year, which requires creditors, with a general mortgage, to seize at first the land last sold by their debtors. The plea of discussion was sustained, and the plaintiffs appealed.

It is contended in this court, that the act of 1817, invoked by the defendants, established a rule of practice, and is consequently repealed by the Code of Practice, and that if it be not repealed, the defendants cannot avail themselves of it, because their ancestor purchased the land, before the passage of the act.

The Code of Practice, 715, provides that, in regard to sales under a *fieri facias*, the purchaser against whom a suit is commenced by a creditor, having a legal or judicial mortgage on the property of the debtor sued, may require the creditor to discuss the other property, in the possession of the debtor, before coming on that which he has in his possession; and even that which the debtor has alienated since the purchase.

Had the legislator gone no farther, it might be urged on the one side, that he intended only a special provision, confined to the cases of purchases at a sheriff's sale, and on the other side, that it being difficult to discover, why a different rule should be established, in regard to such sales, it might be safely concluded, that the reason evidently extending to every sale, all should be regulated in the same manner.

The Code of Practice has re-enacted the same general rules in relation to the discussion of property by creditors having a general mortgage on the property of their debtors, as was provided by the act of 1817, requiring them to proceed against the property last alienated and ascending towards that first sold, until their claims be satisfied.

But the legislator proceeds, and gives us the grounds on which he acts, "because the creditor who has a general mortgage, can only act against the property, which his debtor has disposed of, in the order in which the alienations have taken place, beginning at the most recent, and ascending to the most ancient."

If the rule of practice, in this respect, established by the act of 1817, and invoked by the defendants, was repealed as a rule anterior to the Code of Practice, still the principle is recognised and incorporated in that Code, that the creditor, with a general mortgage, must proceed against the property alienated by the debtor, by beginning at that most recently

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disposed of, and ascending towards that first alienated, until his claim be satisfied.

It remains for us to examine, whether purchasers, before the act of 1817, may avail themselves of a legal provision, enacted since the perfection of the contract, under which the land was acquired.

A right or title acquired under a contract, cannot be modified or affected by any subsequent act of the legislature; but the remedy or means given by law to enforce those rights, are always in the power of the legislature, who may extend or restrict them as circumstances may require.

It cannot be doubted, that the title or rights, acquired under a contract, cannot be modified or affected by any subsequent act of the legislature; but the means of enforcing such rights, and protecting such titles, in other words, the remedy provided by law, to insure the enjoyments of such rights and titles, is always in the power of the legislature, who may extend or restrict it, as circumstances may require.

The means by which a minor's rights against the property of his tutor are to be enforced, are always in the power of the legislature. In requiring him to discuss property last alienated before coming on that previously sold, although the law was enacted after his mortgage attached to the property of his tutor, yet it was in the power of the legislature to pass it.

The lien on the land of the tutor, which results from the trust committed to the tutor, cannot be destroyed or modified, without a correspondent destruction or modification of the minor's rights; but the means by which the minor's rights may be enforced, his remedy is always within the power of the legislature. In requiring him to proceed against the property, most recently alienated by the tutor, the minor's rights or lien in the rest, is not destroyed or modified. Some delay, indeed, is thereby created; but every citizen who is obliged to resort to the court, to enforce his rights, must submit to the forms and delays which the law has prescribed, or may from time to time prescribe.

At the passage of the act of 1817, the minors would have been bound to seize first the tract of land which they are now called on to discuss, because then it was in the possession of their tutor. That act, in requiring them to discuss the same tract after a sale, did not put them on *duriore casu*.

It does not appear to us, that the District Court erred.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

ROMERO ET ALS. *vs.* SEGURA.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where the payee of a promissory note, payable to order, transfers it in writing on the back of the instrument, for twenty per cent. discount, it will be considered a sale, not an endorsement, in which the purchaser will be considered as having taken the risk of the solvency of the maker, without recourse on the transferor; and such a contract is, in its nature, aleatory and not usurious.

Where the sale of a promissory note by the payee, in insolvent circumstances, has been made for *one-fifth less* than the amount promised on the face of it such sale may be rescinded by the creditors of the insolvent; but they would be bound, first to refund the purchase money, when there is no evidence of fraud on the part of the purchaser.

This action is instituted on the following promissory note:

"Nouvelle Iberie le 11 Octobre 1831.

"Au premier Avril prochain, je payerai à Mr. Louis Segura, ou à son ordre, la somme de trois cent quatre-vingt-quinze piastres, avec les intérêts d'un dix pour cent, à compter du jour de la date jusque parfait payement, pour valeur reçu.

"$395. "St. Yago Segura."

Endorsement on the back.

"Reçu le payement à l'escompte de 20 pour cent, par Messieurs Antoine & Michel Romero, fils, que je leur cède.

"Ls. Segura.

"Paroisse Ste. Marie le 30 Décembre 1831."

The defendant pleads a general denial, and admits his signature as the drawer of the note. He alleges the note was given in consideration of a sale made by Louis Segura, to him, of all the rights and pretensions of the latter, to the succession of his father Francisco Segura, and that the said rights and pretensions, were, a very short time afterwards, seized by one of Louis Segura's creditors, together with the

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note sued on, and two others of the same tenor. He further states that he is threatened with a suit, to annul said sale made to him, and for the recovery of the amount of these notes; he also charges that the plaintiffs gave no consideration for the note, or if any, that it was illegal and usurious; and that the date of the transfer of the note is false, and was made but a few days before the filing of the *bilan* of Louis Segura, and at a time when he was in failing circumstances, within the knowledge of the plaintiffs and transferees of the note. He likewise charges fraud and collusion between the plaintiffs and transferor of the note, and alleges it would be unsafe to pay it on account of the claims of Segura's creditors, &c.

The syndic of Segura's creditors intervened and opposed the plaintiffs' right to obtain judgment, and alleged the want of consideration, and that the note showed an usurious discount on its face by the transfer to the plaintiffs, and that the transfer was made at a time when Segura was notoriously insolvent. He joins the defendant in resisting the plaintiffs' demand; and prays that the note be declared to belong to the insolvent estate of Segura, and that he may have judgment for the amount of it, for the use of the creditors.

The defendant and intervenor's counsel offered in evidence the record of a suit, and judgment in favor of Perrault & Pascal *vs.* L. Segura, and also the return on the execution, which issued on it, by which it appeared that the sheriff, on the 31st December, 1831, the day after the transfer of the note sued on, seized certain notes, alleged to be the property of Louis Segura, together with all his interest in his father's succession. The notes seized differed in their tenor and amounts, as described in the sheriff's return from that sued on, but were alleged to be the same. This evidence was intended to show that the defendant was prohibited by this seizure, from paying the amount of the note to the plaintiffs. It appeared also that this execution, after the seizure and before any sale, was stayed by the surrender of the defendant, in favor of all his creditors.

The transfer of the note bears date the 30th December, 1831, and on the sixteenth of January following, Segura filed his *bilan* and made a surrender of his property, which was accepted by the judge. The whole of the proceedings of the suit against his creditors, and several judgments obtained against him before, and at the time of the transfer of the note sued on, were offered in evidence, by which it appeared he was completely insolvent.

The district judge charged the jury, that the note being negotiable, it became the property of the plaintiffs. 2d. The contract is not usurious. Usury is where the debtor contracts to pay more than legal interest; here it is a sale of the note, and may be for a reasonable price. 3d. The plaintiffs were not creditors, and sought no advantage over other creditors. They paid a fair price, which went into the mass of the insolvent's estate; it is then a fair contract, &c.

This charge was excepted to by the defendant, and intervenor's counsel, who also required the judge to charge the jury, that "the plaintiffs should show that due notice of the transfer had been given to the defendant before they could recover; and not having done so, they cannot recover as the seizure of Perrault & Pascal gave them a right of privilege on the notes seized, unless it be shown that a notice of the transfer had been given previous to the seizure." The judge refused to charge the jury as requested, and a bill of exceptions was taken to the entire charge and to the refusal.

There was a verdict and judgment for the plaintiffs. The defendant and intervenor appealed.

Brownson and Lewis, for the plaintiffs.

1. The note sued on was negotiable, was negotiated to plaintiffs for a valuable consideration before maturity, and became their property.

2. The contract by which plaintiffs obtained the note is *not* usurious. Usury is where the *debtor* contracts *to pay more* than lawful interest. Here it was a sale of the note for a fair price, and is valid. *La. Code*, 2423–24. 5 *Com. Digest*, 648–9. 10 *Johnson's Reports*, 195.

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3. Plaintiffs were not creditors of Louis Segura, and could seek no advantage over other creditors; and the price they paid for the note went into the mass of his estate for the benefit of his creditors. 6 *La. Reports*, 538.

4. If plaintiffs knew that Louis Segura was insolvent, still if they paid a fair price for the note, *not being creditors*, they may recover.

5. No law requires the transferee of negotiable paper to give notice to the debtor.

6. The pretended seizure of Perrault & Pascal, was made after the transfer of the notes, and can give them no rights.

Simon, for the defendants and the intervenor.

Mathews, J., delivered the opinion of the court.

In this case suit was brought by the plaintiffs as assignees of a debt transferred to them by one Louis Segura, on St. Yago Segura, the defendant. The evidence of the debt consisted in certain promissory notes held by the transferor, made payable to him in negotiable form by his debtor. Soon after the transfer, indeed so soon as to raise suspicions of the fairness of his conduct, Louis Segura made a cession of his property, in pursuance of our laws relating to insolvents, and a syndic was appointed to manage the ceded property, who intervened in the present suit, claiming a rescission of the contract by which the plaintiffs became proprietors of the notes in question for the benefit of the mass of creditors of the insolvent, and particularly in favor of a judgment creditor, who had seized, under execution, these notes.

Where the payee of a promissory note, payable to order, transfers it in writing on the back of the instrument, for 20 per centum discount, it will be considered a sale, not an endorsement; in which the purchaser will be considered as having taken the risk of the solvency of the maker without recourse on the transferor; and such a contract is in its nature aleatory and not usurious.

The original plaintiffs having prevailed in the court below, the intervenor appealed from a judgment which was rendered in their favor.

The facts of the case show that the creditor had sold to the plaintiffs, the notes on which they commenced the present action, at a discount of twenty per cent. The contract of transfer was a sale of them, not a regular transfer by endorsement, leaving the endorser responsible as such. The purchasers seem to have taken the risk of the solvency of the

maker, without recourse on the transferor. The contract was in its nature aleatory, consequently not usurious. There was a mistake in the seizure under execution attempted to be made by the judgment creditor. The sheriff's return shows that he seized notes of an amount different from those transferred to the plaintiffs; the privilege which the creditor might have acquired in consequence of having made the seizure before notice of the transfer, did therefore not attach. The sale having been made for one-fifth less than the amount promised on the face of the notes would probably authorise the creditors of the insolvent to cause it to be annulled, in pursuance of the 1976th article of the Code. But on claiming a rescission, they would be bound to refund to the purchasers the sums paid by them to the insolvent, as there is no evidence of fraud or bad faith on their part. The syndic has not asked a judgment of this kind in the present instance, and it is not shown that the creditors would be willing to take on themselves the responsibility of refunding.

Where the sale of a promissory note by the payee in insolvent circumstances, has been made for *one-fifth less* than the amount promised on the face of it, such sale may be rescinded by the creditors of the insolvent; but they would be bound first to refund the purchase money, when there is no evidence of fraud on the part of the purchaser.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

TOWLES'S ADMINISTRATRIX *vs.* WEEKS ET ALS.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF ST. MARY.

Where a succession is administered as an insolvent one, and there are judgment and mortgage creditors, they have the right to demand a forced sale for cash, and in the event of the property not bringing its appraised value, a credit of one year must be allowed.

Where the creditors of an insolvent succession, in which there are minors interested, and who have accepted it with the benefit of inventory, meet and concur with a family meeting, in behalf of the minors, that the property be sold on certain terms and credits, the sale will be legal, and confer a valid title on the purchasers, even if it sell for *less than the appraised value.*

A sound interpretation of the law, in relaiton to the administration of successions, whether vacant or accepted with benefit of inventory, will in many cases, authorise a departure from the rule, requiring property of minors to bring its appraised value, before it can be sold.

On the death of Dr. John Towles, in 1832, his widow was appointed administratrix of his succession, which was regularly accepted on behalf of his minor children, with the benefit of inventory. The administratrix finding the succession insolvent, petitioned the judge of probates of the parish of St. Mary, to call a meeting of creditors, to fix the terms and conditions on which the property belonging to the succession, was to be sold. The creditors assembled and fixed the terms and conditions of sale, without expressly ordering that the property should not be sold, unless it brought its appraised value.

A few days after, a family meeting was called on behalf of the minors, and advised and authorised the sale on the same terms and conditions, which had been fixed by the creditors. The proceedings of the family meeting, and that of the creditors, were duly homologated. The sale proceeded. The first plantation was appraised to seventeen thousand dollars,

and was adjudicated to the defendants, for fifteen thousand dollars, being a little less than its appraised value. On being called on to comply with the terms and conditions of sale, the purchasers considered it unsafe to comply, until it should be determined that the sale was legal, and the title such as to prevent its being annulled by the minors, on the ground that the property sold below its appraised value.

The administratrix took a rule on the purchasers, to show cause why they should not execute their notes, and comply with the terms and conditions of sale.

The defendants showed for cause, that the sale was illegal and their title defective, for the following reasons:

1. The adjudication was illegal, because the property was sold below its appraised value, when the legal heirs of Dr. Towles, who are minors, have rights concerned, and are interested in the property, which cannot be sold below its appraised value.

2. The proceedings in relation to said sale, are in other respects illegal and irregular. They pray that the rule be dismissed, &c.

The judge of probates made the rule absolute, and required the defendants to comply with the terms of sale, or in default thereof, the property would be re-sold on their account. They appealed from this decision.

The principal question on which this case depends, is whether or not, the administratrix of an estate, when the heirs are minors, accepting it with the benefit of inventory, can sell the property belonging to it, below its appraised value?

Simon, for the plaintiff, contended that the sale was legal and binding on the purchasers. The administratrix had pursued the legal formalities required by law. The Code requires that the curator of an insolvent succession, should call the creditors together, to deliberate on the most advantageous manner of selling the property of the succession. *La. Code*, 1160.

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2. Administrators of insolvent successions, possess the same powers, and are subject to the same duties, as curators of vacant successions. *La. Code*, 1042.

3. The family meeting has advised the sale, on the terms and conditions fixed by the creditors as most advantageous to the minors. This having been done, the property was to be sold for what it would bring.

Bowen, for the defendants.

Two questions present themselves. *First*, will this court decide the validity of the sale to the defendants, under the present proceedings? The cases where the court has decreed payment, notwithstanding a defect of title, was where the contract was perfected, and the dispute arose about its performance. Here it is inchoate, and the purchasers decline it, under the apprehension that it is illegal.

2. The parties on both sides are desirous, that the validity of the contract shall be determined and decided on by the court, and that the question be settled before any further steps are taken.

3. The consequences to the defendants, if compelled to comply with and fulfil their contract, without a decision on their title, would be hazardous. The money would be paid and distributed among many, or perhaps one hundred creditors, and when the minors arrive at full age, they might set aside the sale, and the purchasers lose both the land and the price.

4. This court, in similar cases, has decided on the regularity of the proceedings, and have refused to direct the purchaser to execute his contract, because of irregularities or defects of title. 5 *La. Reports*, 434. 7 *Martin, N. S.* 93. 6 *Martin, N. S.* 659. 5 *Martin*, 625.

5. If the question is not decided on now, the defendants, when called on to pay or execute their notes, will have a right to demand security. 7 *Martin, N. S.* 93.

6. In regard to the main question, the practice is one way, and the law, perhaps, the other. The object of the law, in a sale by the representatives of minors, and in a sale by an

administrator, are essentially different. In the first case, the law requires that the property should be preserved in nature, for the benefit of the minor, unless a sale is absolutely necessary, or evidently advantageous to him; and in the last case, it should be converted into a general fund for distribution.

7. In the first place, the tutor must represent a family meeting, decide that a sale is advantageous, and the judge homologate the proceedings, before it can be effected. *La. Code*, 334, 335. In the last case, the administrator can exercise no discretion in the matter; he must sell. *La. Code*, 1051, 1055.

8. In the first case, all the formalities which precede the sale, are regulated with care and precision, and the minor's property is not to be sold for less than its appraised value. *La. Code*, 336, 337. In a sale by an administrator, on the contrary, the Code expressly declares, that it prescribes its terms, and no provision exists, that the property to be sold must produce its appraised value. *La. Code*, 1051.

9. In cases where it is necessary, that the property should bring its appraised value, a provision exists for a re-appraisement, in case the first estimation cannot be obtained. Here no such provision exists. What is to be done? *La. Code*, 337.

Mathews, J., delivered the opinion of the court.

This is an appeal taken by the defendants, from a judgment of the court below, rendered on a rule against them, obtained on the part of the plaintiff, to show cause why they should not be compelled to comply with the conditions of the sale of a certain tract of land, adjudicated to them at a probate sale of the succession of the late John Towles, the property purchased being a part of said succession.

The important facts of the case are as follow: John Towles died intestate, leaving a son, a minor, above the age of puberty, by a former wife, and several children, minors, issue of Ann A. Towles, one of the plaintiffs, and also a large estate, in the parish of St. Mary. The surviving wife took

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on herself the administration of this estate, as natural tutrix of her children, and the son of the first marriage, who has claims against his father's succession, is represented by a tutor, regularly appointed for that purpose. The tutrix, having discovered, that her husband was largely indebted, at the time of his death, to various persons, amongst whom there were creditors by judgments and mortgages, applied to the Court of Probates, to have a meeting of the creditors cited, which was acquiesced in, by the tutor of John T. Towles, the son above alluded to. A meeting of the creditors took place, and in their deliberations, they agreed to the sale of the property now in question, on a credit of one, two and three years, payable by instalments, the purchasers to give notes with sureties, to secure the payment of the price. These terms of sale, were in conformity to the decisions of family meetings, which had taken place in relation to the interests of the minors, touching the succession of their father, which had been regularly inventoried and appraised. In the inventory, the tract of land forming the basis of the present dispute, was appraised to seventeen thousand dollars, but at the adjudication ordered, as above stated, was sold to the defendants, as the highest and last bidders, for fifteen thousand dollars. They afterwards refused to comply with the terms of sale, alleging that they would not acquire a clear and indefeasible title to the property bought, as the future claims of the minor children of the intestate would not be concluded, the property not having brought the full amount of its appraisement.

Where a succession is administered as an insolvent one, and there are judgment and mortgage creditors, they have the right to demand a forced sale, for cash, and in the event of the property not bringing its appraised

The legal question arising out of these facts, requires a decision of the court, by which it is to be ascertained, whether our jurisprudence creates any exception to the general rule established by law, which orders, that the property of minors cannot be sold for less than the amount of the appraised value mentioned in the inventory, &c. *La. Code, art* 337.

It is expressly stated, in the article 339, that the prohibition of alienating the immoveables and slaves of a minor, does not extend to a case in which a judgment is to be executed against him, or of a licitation made at the instance

of a co-heir, or other co-proprietor. Here we find a specific exception recognised by law, to the general rule.

If resort be made to the Code of Practice, we find the articles 990 and 991, containing provisions authorising creditors of vacant estates to pursue the succession, and force a sale at a credit of one year, and according to the article 992, "the principles contained in the two preceding articles, apply to all successions accepted with the benefit of inventory, whether the heirs are minors or of full age, and to all successions administered by administrators."

The circumstances of the present case, do not bring it within the express provisions of these articles, but the measures adopted by the parties, seem to us to be more favorable to the heirs of Towles's succession, than a strict pursuance of the letter of the law. It is administered as an insolvent estate, and there being creditors by judgments and mortgages, they might have forced a sale for cash, and in the event of the property not selling for its appraised value, a credit of only one year could have been obtained. The creditors have, however, consented to more favorable terms, by permitting a sale on a credit of one, two and three years,

We are inclined to think, that a sound interpretation of all the provisions contained in our legislation, in relation to the administration of successions, whether vacant or accepted with benefit of inventory, will in many cases authorise a departure from the rule, which requires the property of minors to be sold for not less than its appraised value. Perhaps this rule would not be binding on the administrators of any succession administered as insolvent.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, at the costs of the defendants.

value, a credit of one year must be allowed.

Where the creditors of an insolvent succession, in which there are minors interested, and who have accepted it with the benefit of inventory, meet and concur with a family meeting, in behalf of the minors, that the property be sold on certain terms and credits, the sale will be legal, and confer a valid title on the purchasers, even if it sell for *less than the appraised value.*

A sound interpretation of the law, in relation to the administration of successions, whether vacant or accepted with benefit of inventory, will in many cases, authorise a departure from the rule, requiring property of minors to bring its appraised value, before it can be sold.

ANDRUS ET AL. *vs.* CHRETIEN.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The purchasers of a debt or claim at sheriff's sale, stand in the same relation to the person who owes it, as the creditor of the latter would, or did before the sale; and whatever defence would avail the original debtor against his creditor, is equally valid against his vendees or purchasers.

Where a person assigns and transfers a surety debt for a consideration expressed therein, subrogating his assignee to all his rights, and authorising him to recover the debt by all legal means: Held, that a discharge given by the assignee to the original debtor, in pursuance of the assignment, was valid against the assignor and his vendees, even when the debt was not novated by the assignment, and never paid to the assignee.

Parole evidence is *inadmissible* to prove a verbal agreement to cancel a sale of slaves, or to establish or destroy title to slaves.

Parole evidence is *admissible* to prove collateral facts, such as that the seller took back certain slaves from the purchaser, and had them in possession with the consent of the latter, in consequence of redhibitory defects, and to avoid litigation.

8 8 R. 295

This case has been once before in this court. It was decided against the plaintiffs on the ground that they had purchased a debt due by a *surety* which could not be legally sold. See *the facts of the case reported in* 3*d La. Reports*, 48.

On the return of the case, the debt was re-sold and the suit commenced *de novo*. The debt was sold and purchased by the plaintiffs under the following description, as advertised by the sheriff. "All the right, title, interest and demand which John Andrus (the defendant in said suit) has, in and to a certain debt, contracted by Stephen Brown, as principal, and Hypolite Chretien as his security, with, and to said John Andrus, and the heirs of Charlotte Hanchette, his deceased wife at the sale of the estate, in community between the aforesaid Andrus and the said heirs, &c., at which sale,

Stephen Brown became the purchaser of lot No. 23, in the *procès verbal* of said sale, consisting of four slaves, for the sum of three thousand four hundred and sixty dollars with interest, &c., and a mortgage on the property sold to secure the purchase money, for the payment of which aforesaid sum, &c., to the said John Andrûs, and the heirs aforesaid, the aforesaid Hypolite Chretien became the security of the aforesaid Stephen Brown, and with him signed the *procès verbal* of said sale." The sale was made on the 7th January, 1832, and the plaintiffs, in the execution against John Andrus became the purchasers, for the sum of sixty-seven dollars, being two thirds of the appraised value. The purchasers received the sheriff's deed according to the terms of sale. They then instituted this suit against the defendant, as the surety of the debt, in May, 1832, and pray judgment against him for amount thereof with interest.

The defendant pleaded a general denial; that the debt sold, purports to be owing by a person who lived and died in the parish of St. Martin, which could not be seized and sold by the sheriff of St. Landry; that the succession of Stephen Brown the principal debtor, is not represented, the curator being *functus officio*, and was so long before the seizure and sale of this debt; that John Andrus took back the negroes purchased by Brown, in his life-time, and cancelled the sale and obligation which the defendant signed as surety; and that no inventory was ever made of the slaves, as making part of Brown's succession, after his death; that afterwards John Andrus assigned this debt to Luke Lesassier, and subrogated the latter to all his rights in the same; and who, to make a legal title to the slaves, obtained a judgment by consent with the curator of Brown's succession, had the negroes seized and sold, and purchased them in, in full satisfaction of the original debt; that Lesassier as the assignee of Andrus, gave him (defendant) a full acquittance and discharge from all liability as the surety of Brown, on account of said debt. He finally pleads the prescription of three, five and ten years, and charges fraud in Andrus and Lesassier, and that the plaintiffs purchased said claim with full notice of all these facts and circumstan-

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ces, and at their own risk; and that they have no rights that Andrus did not possess, who had transferred and cancelled the debt, consequently they cannot recover.

The evidence showed, that on the 29th January, 1820, all the estate in community between John Andrus, and the heirs of his deceased wife, was sold at probate sale, and one Stephen Brown purchased lot No. 23, consisting of four slaves, for three thousand four hundred and sixty dollars bearing interest, with H. Chretien his surety; the slaves remaining mortgaged until payment. Brown took the negroes to the parish of St. Martin. And shortly after, finding some of them afflicted with redhibitory defects, (as Brownson, defendant's witness states) intended to bring an action to recind the sale, and employed witness for that purpose. That Lesassier who represented Andrus, was to examine the slaves, and if found defective, the sale was to be annulled and cancelled. On examination it was agreed between the parties, that the sale should be cancelled; and a few days afterwards the slaves were sent to Andrus, near Opelousas, but before any thing was done, Brown destroyed himself, which prevented any act being passed, cancelling the sale. The negroes remained in possession of Andrus, until suit was brought against Brown's succession in the Probate Court.

Things remained in this situation, when on the 7th May, 1825, John Andrus, to whom the debt was due, transferred it to Luke Lesassier, by notarial act, in the following terms: "That H. Chretien, became surety for Brown, in the purchase aforesaid, and signed the *procés verbal* of sale, which sum of money (three thousand four hundred and sixty dollars) has never been paid, &c. Whereas the said John Andrus is justly indebted to L. Lesassier, in the sum of one thousand two hundred and fifty dollars, with interest, &c. Now, therefore, I the said John Andrus, do assign, transfer and set over to the said L. L., all the debt of three thousand four hundred and sixty dollars, subrogating him to all my rights therein, as well those resulting from the mortgage aforesaid, hereby authorising the said L. L., by virtue of this assignment and transfer, to proceed and recover the said sum of

money from the said Brown, his heirs or executors, or his surety, H. Chretien, by all legal means; as also to proceed by hypothecary action against said slaves, so purchased, as aforesaid; and the said L. L., accepting this assignment and transfer, doth promise to return and pay over to said John Andrus, all sums of money which may come into his hands, in virtue of this transfer, over and above the sum of one thousand two hundred and fifty dollars, as aforesaid." Signed before a notary and two witnesses, by Andrus and Lesassier.

Brown having died, John Brownson was appointed curator of his vacant succession, the 20th March, 1824. In May, 1827, Lesassier instituted suit in the Probate Court for the parish of St. Martin, against the curator of Brown's succession for the amount of said debt. Brownson, as curator, pleaded the general issue to the action.

Brownson, in his testimony, swears, that he then stated to Lesassier, that the suit could not go on without the matters of taking back the negroes, by Andrus, on account of redhibitory defects, were set up in defence. It was then agreed, verbally, between them, that judgment should go against Brown's estate, simply in order to obtain a title to the negroes, so that he might get the proceeds of any sale he might make of them, and the judgment was rendered for this purpose. That on the 15th May, 1827, he took an agreement to this effect, &c. On the 28th May, 1827, Lesassier had judgment for the sum of three thousand four hundred and sixty dollars and interest, ordering that the negroes purchased by Brown, be seized and sold, to satisfy the same. In June following, the negroes were sold under an execution, issuing on said judgment, to the parish of St. Landry, and Lesassier became the purchaser for one thousand and eighty dollars.

After instituting the above suit, Lesassier gave Brownson the following written instrument, alluded to in the testimony of the latter:

"Whereas suit has been instituted by me, against J. Brownson, as curator of the succession of Stephen Brown, for the purpose of obtaining a judgment which shall authorise the seizure and sale of certain negroes, bought by the said

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Stephen Brown in his life-time, of a certain John Andrus, which sale was subsequently cancelled by a verbal agreement between the said Brown and the said Andrus: Now, therefor, I engage that said judgment, if obtained against the said Brownson as such curator, shall never be made use of by me, or by any other person representing my rights, as the foundation of any claim, either for principal, interest or costs, against the said Brown's succession, it being my design and intention to make use of it, solely to authorise a further proceeding against the property, the sale of which to the said Brown was cancelled as before stated; and I further engage to pay all costs," &c.

Opelousas, 15th May, 1827. "L. Lesassier."

On the 18th October, 1827, following the above, Lesassier gave Chretien, the surety of Brown, a complete acquittance and discharge from all responsibility, on account of said surety debt, which he signed as assignee of John Andrus.

The plaintiffs obtained judgment in the Probate Court, for the parish of St. Landry, on the 29th March, 1828, against their father John Andrus, for their portion of their mother's estate, amounting to three thousand eight hundred and forty-three dollars forty-eight cents, with interest, and a legal mortgage on all the real property and slaves of said John Andrus, owned and possessed by him on the 27th January, 1820, until paid.

The debt in question was seized and sold under an execution, issuing on this judgment, in the parish of St. Landry, the residence of John Andrus the defendant in execution, and purchased by the plaintiffs.

The parole evidence taken to prove the cancelment of the sale to Brown, and the return of the slaves to Andrus, with the proceedings had in relation thereto, was received subject to all legal objections. It was objected to by the plaintiff's counsel, as inadmissible.

After hearing the evidence of the case, the district judge being of opinion the defendant was not liable, rendered judgment in his favor. The plaintiffs appealed.

Garland, for the plaintiffs.

1. The testimony of Mr. Brownson is inadmissible, as he was, at the time of giving it, the curator of Brown's estate; also, because it goes to prove a parole agreement to rescind a sale of slaves. The testimony of Moore is also inadmissible, being liable to the last objection to Brownson's evidence. The same objection applies to all that portion of Mr. Simon's testimony, relative to the rescission of the sale. 3 *Martin*, 486. 4 *Martin, N. S.* 212.

2. All the right, title or interest, which John Andrus had in or to the claim against Brown's estate, or against the defendant as the surety of Brown, is now vested in the plaintiffs, by virtue of the sheriff's sale, made under the execution issuing out of the Probate Court of St. Landry, in the suit of the present plaintiffs, against John Andrus. And unless the defendant can show he is discharged, the plaintiffs must recover.

3. The first objection cannot be sustained. The execution under which plaintiffs purchased, was against John Andrus. He resided in St. Landry, and the evidence of the debt was of record in the office of the judge of that parish. It would not have been legal to have sent the execution to the parish of St. Martin, where Brown's succession was opened. *Code of Practice, art.* 642.

4. The sale is not void in consequence of the service of the notice of seizure. In the first place it was not necessary to have given any notice of the seizure, to Brown's curator, or to Chretien, but if it was, it has been done legally. A notice was served on Chretien, by the sheriff of St. Landry, and one on Brownson, as Brown's curator, by the sheriff of St. Martin, and defendant is now estopped from saying Brownson was not the curator, as he has given in evidence two documents, in which the character of curator is taken, both of which bear date subsequent to the seizure.

5. No agreement to rescind a contract of sale of slaves can be proven by parole evidence, though accompanied by possession. But if any such contract ever was made, which is not admitted, it appears from the evidence, it was the inten-

tion of the parties to reduce it to writing, which was never done; therefore, either party had a right to retract, and John Andrus did retract, as is conclusively established. 1 *Martin, N. S.* 420, *and the authorities there cited.* 3 *Martin*, 486, *and* 4 *Martin, N. S.* 212.

6. There is no evidence of any fraud practised by John Andrus or Lesassier, on Brownson, as Brown's curator. But if there was, it would not avail the defendant any thing. He alleges the effect of the fraud, was to prevent Brown's curator from pleading the redhibitory defects of the slaves in the suit Lesassier instituted against him. Suppose for a moment it was so, in what way can it benefit the defendant? No fraud has been practised on him, and he, as Brown's surety, has a right to set up all the exceptions and defences that Brown or his curator might have pleaded, yet he has not in his answer said one word about the redhibitory defects of the slaves. Is not the conclusion therefore irresistible, that no such defects existed, and that all the allegations about fraud, were thrown into the answer, for the purpose of getting parole evidence admitted of an agreement to rescind the sale?

7. The judgment of Lesassier against Brown's curator, was not rendered by consent. The record of that suit shows directly the reverse. An answer is filed, denying all the allegations in the petition, and the judgment states, that it was rendered upon full proof of the allegations contained in the petition, and after hearing the parties.

8. The instrument by which this claim was transferred, by Andrus to Lesassier, is not an *act of transfer*, but a *procuration.* If it be a transfer, it is only for the portion that was due to Lesassier by Andrus, viz: the sum of one thousand two hundred and fifty dollars. Lesassier was in fact nothing more than the mandatory of Andrus, to collect this debt and pay over the balance, after deducting what was due to him by the latter.

9. The mandatory or mere attorney in fact, has no authority to release a debt, or make a donation of a claim or debt of his principal without consideration, consequently the releases and acquittances of Lesassier, executed to the defend-

ant and the curator of Brown, are null and void. *Pothier, Contrat du Mandat, vol.* 6, *p.* 87, §2. *Ib. p.* 103, *ch.* 2, *No.* 53.

10. The act under which Lesassier transacted this business, has all the forms and requisites of a procuration. *La. Code,* 2955, 2966.

11. The attorney in fact or mandatory, has the right to retain, out of the sum in his hands, all sums necessary to cover his costs and expenses, and even to offset a debt owing to him by his principal. This was precisely the case of Lesassier and Andrus. *La. Code,* 2992.

12. But even if this be a transfer of the debt from Andrus to Lesassier, it is only in trust for the portion over the sum due to Lesassier, and the trustee cannot release the debtor without full consideration. In any view we take of the case, the plaintiffs must recover at least the surplus of this claim, beyond the amount of Lesassier's debt on Andrus.

Simon and Brownson, for the defendant.

1. The sale of this debt was illegal. The principal debt existed against Brown's estate, in the parish of St. Martin, but the execution issued, and the sale took place in the parish of St. Landry. *Code of Practice, art.* 642.

2. The seizure and sale are void, because Brown's estate was not represented. The curator was *functus officio,* and had never been re-appointed.

3. The act of transfer from Andrus to Lesassier, was sufficient to invest the latter with the complete ownership of this debt; and authorised him to dispose of it as he thought proper. *Pothier, Vente, No.* 550, 558, 574–5–6–7.

4. Being the legal owner of this debt, Lesassier had the right to give a release of it. He has done so to the defendant Chretien, who is the surety, and now completely discharged from his suretyship.

5. The object of this transfer was for the particular purpose of giving effect to a previous verbal agreement, relative to the cancelling of the sale of certain slaves to Brown, which had been taken back. Lesassier effected this object by obtaining a judgment against Brown's succession, by consent,

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and having the slaves sold under it to perfect the title to them, by divesting Brown's estate of it. Lesassier purchased the slaves, in this way, for the whole debt. In doing this, he acted in accordance with his mandate from Andrus. This *mandate* was of the fullest extent, and contained the most ample powers. *Pothier Mandat, No.* 144–5–6, &c.

Bullard J., delivered the opinion of the court.

The plaintiffs sue as owners, by purchase at sheriff's sale, of a debt, alleged to be due by the estate of Stephen Brown, and the defendant, his surety. They show that Brown purchased, at the public sale of the estate of their mother, in community with their father, a certain lot of slaves, and that Chretien became his surety for the payment of the price; that having obtained a judgment against their father, as tutor, they levied their execution on that debt, and it was adjudicated to them.

The defendant pleads, among other exceptions, not now necessary to notice, that at the time of the seizure of the debt by the plaintiffs, it was not the property of John Andrus, their debtor, but had been assigned and transferred to Luke Lesassier, who had given, both to the defendant and the estate of Stephen Brown, a full discharge, to the knowledge of the plaintiffs themselves; that soon after the sale of the slaves to Brown, and previously to the assignment of the debt to Lesassier, John Andrus had taken back the slaves, under a verbal agreement to cancel the sale, on account of certain redhibitory defects; and that he retained possession of them, until they were sold by the sheriff of St. Landry, to satisfy a judgment, recovered by Lesassier in his own name, as assignee, against the vacant estate of Brown; that the judgment so recovered, was rendered by consent, upon a written agreement of Lesassier, with the curator of the estate, that the same should be used, for the sole purpose of divesting the estate of the legal title in the slaves, in pursuance of the verbal agreement, although the estate had a good defence to the action; and that the slaves were sold and bought in by Lesassier, in satisfaction of the judgment,

thereby carrying into effect the original agreement, all which was done with the knowledge and consent of John Andrus. The respondent further alleges, that all these proceedings were carried on, without any notice to him, as surety of Brown, and that thereby it is no longer in the power of John Andrus, to subrogate *him* in his rights and actions against Brown. He further alleges, that afterwards in 1827, Lesassier, in pursuance of the same agreement, gave him a full and complete discharge. He further says, that an attempt, now to make him liable for this debt, is owing to the fraudulent conduct of Lesassier and John Andrus; that Brown, and afterwards John Brownson, Esq., the curator of his estate, acted in good faith, and that all the transactions took place, in consequence of the fraudulent representations of Andrus and Lesassier, while fraud was used to deprive the estate of Brown of the legal right, to have the sale cancelled, to obtain a fraudulent title to the slaves, and of compelling the purchaser afterwards to pay the price. He further alleges, that the plaintiffs, when they purchased the claim, had due notice of all the equitable defences in his favor.

The purchasers of a debt or claim at sheriff's sale, stand in the same relation to the person who owes it, as the creditor of the latter would, or did before the sale; and whatever defence would avail the original debtor against his creditor is equally valid against his vendees or purchasers.

It may be assumed as undeniable, that the plaintiffs have no greater rights than John Andrus, and that whatever defence would avail the defendant against him, is equally valid, against those who stand in his rights. We will, therefore, consider the defence, as if John Andrus was himself the plaintiff in this action.

The first question which presents itself, is the validity of the final discharge, given by Lesassier to the defendant, and that depends on the question, whether by the assignment from Andrus to him, the latter was the absolute owner of the debt. The assignment recites the purchase of the slaves by Brown, and the suretyship of Chretien, as well as the terms and conditions of the sale. It then goes on to say, that John Andrus, being indebted to L. Lesassier, in the sum of twelve hundred and fifty dollars, with interest, at the rate of ten per cent., from that date, "now I, the said John Andrus, do assign, transfer and set

over, to the said L. Lesassier, all the debt of three thousand four hundred and sixty dollars, as aforesaid, subrogating him in all my rights therein, as well as those resulting from the mortgage aforesaid, hereby authorising the said Luke, by virtue of this assignment and transfer, to proceed and recover the said sum of money, by all legal means," &c. "and the said L. Lesassier, accepting this assignment and transfer, doth promise to return and pay over to said J. Andrus, all sums of money, which may come into his hands, in virtue of this transfer, over and above the sum of twelve hundred and fifty dollars, with the interest which may thereon accrue, as aforesaid."

Where a person assigns and transfers a surety debt for a consideration expressed therein, subrogating his assignee to all his rights, and authorising him to recover the debt by all legal means: *Held*, that a discharge given by the assignee to the original debtor in pursuance of the assignment, was valid against the asssignor and his vendees, even when the debt was not novated by the assignment, and never paid to the assignee.

It is contended on the one side, that this is an absolute sale, vesting in Lesassier all the rights of Andrus, and authorising him as master of the thing, to discharge it, and give even a gratuitous release; and on the other side, that it amounts only to a power of attorney; that the debt due by Andrus to Lesassier, was not novated by that assignment, and that although a payment made to Lesassier, would have been a good payment, yet it is evident from the whole tenor of the act, that the intention of the parties was, that Lesassier was bound to recover the whole debt, which he might do in his own name, and to retain only the amount of the debt due to him.

It seems to us clear, that the debt due by Andrus to Lesassier, was not novated by the assignment. There are no words importing a novation. On the contrary, that debt was still to bear interest after the assignment. But it authorised Lesassier to prosecute in his own name, for the recovery of the debt, and we are inclined to think, that the defendants might have pleaded in compensation, a debt due by the assignee; but whether a release, purely gratuitous, would have discharged the debtors, appears to us very questionable.

This brings us to inquire, what was the real character of the two releases given by Lesassier, first to Brown's estate, and afterwards to Chretien, and whether considering Lesassier, as merely the attorney in fact, complied with a personal

interest, those releases recite, and are based on such considerations and accompanied by such facts, as to conclude John Andrus himself?

We cannot better illustrate our views of this part of the case, than by supposing, that John Andrus had sued Lesassier, to recover the balance of the debt, over and above the twelve hundred and fifty dollars, and we were called on to consider, how far the latter could justify himself in relation to his principal, for having executed those releases. Might he not say to his adversary, if you consider me, in relation to that matter, merely as your agent, under what circumstances was that agency created? At the time you authorised me to prosecute for that claim, were you not in possession of the slaves, under an agreement, verbal if you will, but still an agreement binding on you, that the sale should be rescinded? Did you not take back the slaves, with a knowledge that they were *unsound*, and that Brown had a valid defence? Can it be supposed, that you intended to prosecute for the whole amount of the claim, which you admitted would be unjust? Did you not refer Mr. Chretien to me, as charged with the whole business, asserting at the same time, that he was released? You either intended to deceive me, and cannot now profit by your own wrong, or to make me the instrument, by which Brown and Chretien should be defrauded, by disarming them of a just defence, and then holding them to their full responsibility, notwithstanding both your acts and mine?

It is not necessary for us to say, how far such a defence would avail Lesassier in the case supposed, sustained by the evidence in this record. But we are to inquire how far a similar defence, now set up by Chretien, under the same evidence, ought to avail him. Two instruments are produced by him, signed by Lesassier as assignee. By the first, between him and the curator of Brown's estate, it is recited, that suit had been brought by him, for the purpose of obtaining a judgment, which would authorise him to seize and sell the slaves in question, the sale having been previously cancelled, by verbal agreement between Brown and

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Andrus, and he engages that the judgment shall never be used for any other purpose. In consequence of the agreement, the curator forbore to set up the legal defence, put in one merely nominal, and suffered judgment to go. In pursuance of that judgment, the slaves then in possession of John Andrus, in the parish of St. Landry, were sold by the sheriff, and purchased by Lesassier.

The second is a release, executed by Lesassier as assignee, in favor of the defendant Chretien, in which he declares, that having obtained the judgment above mentioned, merely to obtain a title, by which the slaves could be sold, he gives Chretien as full and complete a discharge, as if the debt had been paid.

Were these releases purely gratuitous, or were they founded on considerations, which make them conclusive upon John Andrus? The defendant as surety of Brown, having a right to plead all the exceptions of which the principal might avail himself, except those merely personal, the two agreements must be taken and considered together, in their legal effects. It results from both of them, that as the obligation of Brown to pay, was, to say the least of it, doubtful, in consequence of the defects of the slaves Andrus had taken them back; that in consequence of the death of Brown, in the mean time, it became impossible to cancel the sale by agreement, and that to avoid the delay and trouble of restoring them to the estate, and proceeding directly to have the sale cancelled judicially, his agent or assignee had resorted to the means above related, as a species of machinery, by which Brown's estate should be divested of the title. John Andrus profited by this agreement, to a certain extent; he enjoyed the labor of the slaves without interruption, from within a short time after the original sale, up to the sheriff's sale, under the judgment; he avoided perhaps a tedious litigation, and the hazard of paying the costs and expenses of an expensive law suit, if Brown's succession had insisted on its legal defences.

But it is said this defence rests mainly on parole evidence, which was received, subject to all legal exceptions, and that

Parole evidence is *inadmissible* to prove a verbal agreement to cancel a sale of slaves, or to establish or destroy title to slaves.

Parole evidence is *admissible* to prove collateral facts, such as that the seller took back certain slaves from the purchaser, and had them in possession with the consent of the latter in consequence of redhibitory defects and to avoid litigation.

it was clearly inadmissible to prove a verbal agreement, to cancel a sale of slaves. Undoubtedly parole evidence is inadmissible, to establish or destroy title to slaves. This is a principle too well settled to admit a doubt, and if the title to the slaves in question, depended on this evidence, it would be entirely disregarded. But the question here, is not whether Brown's estate was divested of title, by virtue of the agreement, or whether the slaves became thereby the property of Andrus. We think the parole evidence admissible to prove, as collateral facts, that Andrus was in possession of the slaves at least; that he was in possession with the consent of Brown; that he had examined the negroes, and was convinced they were defective; that he declared to the attorney of Chretien, that he had the slaves, and that he considered Chretien discharged, and referred him to Lesassier, as charged with the whole business; that a redhibitory action, as stated by Mr. Brownson, was about to be brought by Brown, soon after his purchase; and that he *desisted* from bringing the suit, in consequence of Andrus taking back the slaves, after inspecting them in company with him and his own attorney, who were convinced of the fact, that the defects did exist.

With this view of the case, one of two conclusions seems to us inevitable, either that the intention of John Andrus and Lesassier, were fair and honest, and that the steps taken by them, either separately or together, were intended merely to divest the estate of Brown, of the legal title to the slaves, by the only means which remained, without any expectation of claiming the debt; or that the acts of both were calculated, if not designed, to deprive Brown, and consequently Chretien, of a just legal defence. More than fourteen years have elapsed since the purchase, and seven since the release given by Lesassier. Soon after the purchase, the slaves were taken back, and were never afterwards in possession of Brown, and these acts were accompanied by the declaration, that Chretien was discharged. We think ourselves bound to adopt that hypothesis, which comports with the good faith and honor of the parties concerned, and to say, that the acts

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done, were in pursuance of an intention to cancel the contract, and to release the defendant, rather than that which would present them, in relation to him, as concurring in a series of acts, productive of the most gross injustice. Believing, therefore, that John Andrus himself, would not be entitled to recover, the present plaintiffs can have no better right.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF LOUISIANA.

WESTERN DISTRICT.

ALEXANDRIA, OCTOBER, 1834.

COMPTON ET ALS. *vs.* PEARCE.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

A party who propounds interrogatories to be answered *in open court*, but neglects to have a day fixed on which the adverse party is to answer, waives his right to have them taken *pro confesso* if they be not answered.

Either party has the right of having his interrogatories answered in open court, and in his presence. No order of court is necessary, as it is a right the law gives.

The Code of Practice requires the answer to be made when both parties are in court; and as the answer is for the benefit of the party provoking it, he should take the means required by law, and have the day fixed.

The plaintiffs instituted suit on several promissory notes, executed by the defendant, amounting to the sum of two thousand three hundred and sixteen dollars fifty nine cents, with interest thereon, at ten per cent. per annum, from the several periods when said notes became due, until paid.

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The defendant avers that the notes sued on, were given as part of the price of four hundred arpents of land; and that the quantity of land sold is ascertained to be less, by nearly two hundred arpents, than that purchased. He further states, that he has already paid more than the *pro rata* portion of what land remains, the difference of which he is entitled to demand in reconvention. He prays for an order of survey, to ascertain the precise quantity of land he has received, and for a diminution of price in proportion to the deficiency in quantity.

The defendant annexed several interrogatories to his answer, to show the notes sued on were given for part of the price of four hundred arpents of land, and to prove several payments. He required the plaintiffs to be ruled, to answer the interrogatories *in open court, and on oath.* He annexed his affidavit that the answers of the plaintiffs, to his interrogatories were material.

"Upon which the court ordered, that the foregoing interrogatories should be answered."

The deed of sale to the defendant, expressed the price and consideration of the land alleged to have been purchased, to be five thousand dollars, which sum is acknowledged to have been paid in hand at the time of the contract.

No day being fixed to answer the interrogatories, the plaintiffs did not answer them. The district judge rendered judgment for the plaintiffs for the sum claimed, with interest and costs. The defendant appealed.

1. *Winn*, for the plaintiffs, contended, that the defendant had propounded certain interrogatories to be answered by the plaintiffs, and obtained an order, but fixed no day on which to have them answered. They must now be considered as a nullity and cannot be taken as confessed. His right to have them answered is waived by this omission. *Code of Practice*, 351, 2 *La. Reports*, 72.

2. The act of sale to the defendant of the land in question, shows it was made for cash. It contradicts the defence set up, that it was made on a credit and must prevail.

Boyce & Barry, for the defendant; showed that the plaintiffs sold to the defendant, four hundred arpents of land, for which the latter bound himself to pay a full price and consideration; but has since ascertained that near half the quantity purchased, is covered by an adverse claim, which entitles him to a large deduction from the price agreed on.

2. The court ordered the interrogatories to be answered; and the plaintiffs were bound to have the day fixed, on which they should make their answer in open court, in obedience to the order.

3. The plaintiffs having failed to answer the interrogatories as required, they must be taken as confessed by them.

Martin, J., delivered the opinion of the court.

A party who propounds interrogatories to be answered *in open court*, but neglects to have a day fixed on which the adverse party is to answer, waives his right to have them taken *pro confesso* if they be not answered.

A single question is presented to the court in this case, viz: whether a party who propounds interrogatories, and requires them to be answered *in open court*, but neglects to apply to the judge to have a day named on which they are to be answered, waives his right to have them taken *pro confesso*, if they be not answered.

This question was solved in the affirmative, in the case of *Stewart* vs. *Carlin*, 2 *La. Reports*, 72.

The only difference which exists between that case, and the present is, that the prayer in the first for the interrogatories to be answered in open court, was not acted upon by the court, while in the case before us, the court ordered the interrogatories to be answered.

Either party has the right of having his interrogatories answered in open court, and in his presence. No order of court is necessary, as it is a right the law gives.

It appears to the court, that the difference does not authorise a distinction. Either party has the right of having his interrogatories answered in open court, and in his presence, if he requires it. No order of court is required to entitle him to a right which the law gives him absolutely. The obligation of the party to whom the interrogatories are propounded to answer them in open court, is not increased by the order. It is, therefore, clear, that a useless order cannot distinguish the case in which it is made, from one in which it is not made.

The counsel of the appellant have, however, requested us to reconsider the decision in the case cited, as it stands alone

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as a solitary one. He has urged upon the court, that the *Code of Practice, art.* 351, requires, indeed that the interrogatories which are required to be answered in open court, should be answered on the *day appointed to that effect by the judge*, but it does not make it the duty of the party interrogating to provoke the appointment of the day. He has insisted that it is the duty of the party who is required to answer, to provoke such an appointment, which he considers is made for the convenience of the party called on to answer.

The Code of Practice requires the answer to be made when both parties are in court, and as the answer is for the benefit of the party provoking it, he should take the means required by law, and have the day fixed.

As the Code requires that the answers shall be made at a time when *both* parties are present in court, it appears to this court, that the convenience of neither is to be consulted exclusively. The answer is for the benefit of the party interrogating, otherwise he would not require it. If it be for his benefit, and he has an interest to obtain it, it is but fair he should take the means required by law to obtain it.

This court on a reconsideration of the case of *Stewart* vs. *Carlin*, sees no reason to be dissatisfied with the decision then made, and we do not think the District Court erred, in deciding in conformity with it.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

WALSH *vs.* WELLS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

The holder of a promissory note, payable to order, and endorsed in blank by the payee, is entitled to recover on it; it being in the nature of a note payable to bearer.

A claim on a commercial firm, cannot be pleaded in compensation, or set off to a demand by one of the partners, against the defendant.

This action is instituted on the following promissory note, signed by the defendant:

"Alexandria, April 2d, 1826."

"On the first day of January next, I promise to pay, to the order of James Armor, eight hundred and twelve dollars, value received, payable at the Bank of Orleans."

"Montford Wells,"

Endorsed. "James Armor,"
"*per pro* Samuel P. Morgan."
"John Walsh."

The note was duly protested for non-payment.

The record shows, that in March, 1830, Samuel P. Morgan brought suit on this note, against the present defendant. The latter excepted to the action, alleging that Morgan was dead at the inception of the suit. In April term, 1830, the suit was dismissed, it appearing the plaintiff was dead.

At the April term, 1831, the present suit was instituted, in the name of the present plaintiff, who appears to have endorsed the note, in the name of S. P. Morgan, as his attorney in fact. He alleges in the petition, that *said note was endorsed to him by the said Armor, previous to the maturity thereof*; he prays judgment for the amount of the note, with legal interest and costs.

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The defendant denies, that the plaintiff is the owner of the note sued on, but that it belongs to the late firm of S. P. Morgan & Co., and prays to be dismissed. He further charges, that the firm of S. P. Morgan & Co., to whom the note belongs, owes him one thousand four hundred and thirty dollars, for a note of Robert Martin and James Bowie, dated 17th January, 1826, payable one year after date, which the said firm, then holding his note, received to collect and account for to him, but which they have failed to do, so that they have become liable to him for the amount thereof. He prays that the demand be rejected, and that the plaintiff be ruled to answer *on oath*, whether the firm of S. P. Morgan & Co., was not composed of S. P. Morgan and John Walsh, the present plaintiff? He alleges, that the plaintiff was a member of said firm, and bound *in solido*, to account for said note to him.

At the April term, 1832, the court ordered the interrogatory set up in the answer, *to be answered.* At the spring term, in 1833, no further steps having been taken in this cause, judgment was rendered in favor of the plaintiff, for the amount of the note sued on, with interest and costs.

The receipt of *S. P. Morgan & Co.*, dated March 17th, 1828, for Martin & Bowie's note of one thousand four hundred and thirty dollars, was offered in evidence by the defendant, in which they say, "*when collected, we promise to account for, to Mr. Montford Wells.*" The plaintiff's counsel objected to the admission of this paper, in evidence, but it was received by the court, and a bill of exceptions taken to its admission. The plaintiff had judgment for the amount claimed, rejecting the demand set up in the defence. The defendant appealed.

Thomas, for the plaintiff.

1. This suit is brought on a promissory note, payable to order, and endorsed in blank. Suit was first instituted by S. P. Morgan, a member of the firm of Morgan & Co., to whom it was transferred by the endorsement. Morgan died, and the suit was dismissed. The present holder now seeks to recover on it.

2. The present plaintiff is entitled to recover, as the legal and *bonâ fide* holder of the note, which being negotiable and endorsed in blank, passed into his hands by delivery.

Boyce, contra.

1. The plaintiff cannot maintain his action on this note, when the evidence shows it is the property of Morgan & Co. Morgan, it is shown, died before the transfer, and no legal transfer has been made of it since.

2. Walsh, the present plaintiff, should have sued as surviving partner of Morgan & Co., and not in his individual right. Not being the owner of the note, he cannot recover.

3. The note of Martin & Bowie, which Wells gave to Morgan & Co., and now set up in compensation and reconvention, must be accounted for, and allowed as an offset to the plaintiff's demand.

Thomas, in reply, contended that the blank endorsement of Armor, to whom the note was made payable, authorised the plaintiff to sue in his own name. He had the right to strike out the endorsement of S. P. Morgan & Co., and fill up the endorsement to himself.

2. The holder of a promissory note, endorsed in blank, who is not alleged to be in the wrongful possession of it, may fill up the endorsment to himself, and sue in his own name. The plaintiff then has an undoubted right to recover.

Martin, J., delivered the opinion of the court.

The defendant resists the plaintiff's action on a promissory note, by a denial of his right to sue, and on an allegation, that he had a claim on a commercial firm, of which the plaintiff was a member, for the amount of a note, which he had given for collection, and which was unaccounted for. He contends the amount of this note must be allowed, in compensation of the note sued on.

The plaintiff had judgment, and the defendant appealed.

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The holder of a promissory note, payable to order, and endorsed in blank by the payee, is entitled to recover on it; it being in the nature of a note payable to bearer.

In support of the first ground of defence relied on, the defendant refers to the blank endorsement, made by the plaintiff, as attorney in fact of Morgan, and to the record of a suit brought by Morgan, on the note now sued on.

The note was endorsed in blank, by Armor the payee. It is therefore clear, the plaintiff being the holder of the note thus endorsed, may sue for and claim its amount, as that of a note payable to bearer, and claim under the first endorser, who is the payee of the note.

His subsequent blank endorsement, could have no other effect, than to authorise the holder to fill it up as he pleased, or treat the note as one payable to bearer. Banks require the blank endorsement of those who offer notes for discount, or which are deposited therein for collection; and it never was pretended, that such an endorsement was evidence of a transfer of property in the note, until it was delivered, or the endorsement filled up.

The record of the suit brought by Morgan, shows that that suit was dismissed. There is, therefore, nothing in what is offered to prevent the present plaintiff from urging his possession of the note, with a blank endorsement, as evidence of his right of action thereon.

Overruled 6 A.R. 528. Bleb & Patrick

A claim on a commercial firm cannot be pleaded in compensation or setoff to a demand by one of the partners against the defendant.

The other means of defence, cannot avail the defendant. He cannot urge a claim, on a firm of which the plaintiff was a member, in defence of the individual claim of the latter; because a claim on a firm, cannot be offered in compensation of that of one of its members.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

LEAVENWORTH *vs.* PLUNKETT.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

A petition for an order of sequestration is not an amendment of the original pleadings; but is in a manner wholly unconnected with them, and does not require leave of the court to file it.

To obtain an order of sequestration of a tract of land, to prevent the possessor from committing waste, and using the fruits and revenues, the affidavit must set forth a *legal cause*, that the party obtaining it, has *good ground* of apprehension, &c. It is insufficient to state he has *ground* to apprehend that the defendant will commit waste, &c.

The plaintiff alleges he is the owner of a section of land, lying on Red River, in the parish of Natchitoches, which was confirmed by act of congress, passed the 5th of February, 1825, to one John Litton, from whom he derives title. That notwithstanding his right and title to said land, the defendant has taken possession of a part of it, and refuses to restore it, although amicably demanded. He prays that the defendant be required to restore and deliver up the possession, and pay him ten thousand dollars for waste and profits, in cutting timber and raising crops thereon, and that he be adjudged to pay one thousand dollars per annum, from the inception of suit until possession is restored, for the use of said land, &c.

The defendant pleads a general denial; and denies specially that the plaintiff and Litton, under whom he claims, have any title to the land in contest. The land confirmed to Litton, he allges, is situated on the Bayou Tortoise, near the Sabine where he resided in 1814, when he filed his application and claim before the land commissioners; and that he never cultivated or occupied any land on Red River, &c. That the claim of John Litton has never been located by competent authority, so as to embrace the land occupied by this

respondent. It is admitted a survey was made and patented, but was caveated, and on appeal to the commissioner of the general land office, the patent was withheld, &c.

He further alleges that he settled on the land in contest, previously to the year 1829, and has continued to cultivate and occupy it ever since; that a preemption has been awarded him by the register and receiver, at Opelousas, according to law. That acting in good faith, he has made valuable improvements on the land, worth ten thousand dollars, for which he prays judgment in case of eviction.

After suit had been pending six months, the plaintiff presented his petition, alleging that he had *good grounds to fear and apprehend*, that the defendant would make use of his possession, to dilapidate the land occupied by him, and waste the fruits and revenues arising therefrom; he prayed that the land in controversy be sequestered during the pendency of the suit. An affidavit of the plaintiff embracing these facts, accompanied the petition.

The District Judge allowed a writ of sequestration as prayed for, on the plaintiffs executing his bond with a surety, in the sum of two thousand five hundred dollars.

From the order of sequestration, the defendant appealed.

Winn, for the appellant, assigned the following points as errors on the face of the record.

1. That the new petition is clearly an amendment of the original one; and no amendment can be filed without leave of the court, and which must be obtained in open court. *Code of Practice*, 419.

2. The affidavit of the plaintiff is insufficient to obtain an order of sequestration. It only states that the affiant has "*grounds to apprehend waste, &c.*, which is too vague, loose and equivocal, to sustain this application and order.

3. This is such a case as will authorise an appeal. The injury would be irreparable without it. A man's entire property might be taken from him without color of justice or law. 5 *Martin, N. S.* 42.

Boyce, contra.

1. This is a conservatory measure given by law, to a party who has good ground to apprehend that his adversary will make use of the property in contest, so as to dilapidate or waste the fruits and revenues during the pendency of the suit. *Code of Practice, art.* 275, *No.* 3.

2. The appeal is illegal, and does not properly lie from the decision of the court refusing to dismiss the order of sequestration. The appeal should therefore be dismissed.

Winn, in reply, contended, that the appeal was properly taken, and would lie in this case. 5 *Martin, N. S.* 42. 10 *Martin*, 174.

Martin J., delivered the opinion of the court.

The defendant is appellant from an order of the district judge, granting a writ of sequestration on the petition and affidavit of the plaintiff, made subsequent to the institution of suit.

The appellant relies on the following assignment of errors.

1. The petition for the order of sequestration, is clearly an amendment of the original one, and as such, could not have been filed without leave of the court.

2. The affidavit on which the application is grounded, is not such a one as the law requires.

3. The affidavit states, that the affiant has *ground to apprehend, &c.*, which is too vague, loose and general.

A petition for an order of sequestration, is not an amendment of the original pleadings; but is in a manner wholly unconnected with them, and does not require leave of the court to file it.

A petition for an order of sequestration does not appear to this court to be an *amendment* of the original petition. It is in a manner wholly unconnected with it. It does not necessarily supply any defect in the original pleadings, as it often sets up and claims a right resulting from circumstances *posterior* to the *petition*. This is the case when the *ground* of apprehension is given by the conduct of the defendant during the pendency of the suit. All that the law requires in the affidavit on an application for a writ of sequestration, is that it should set forth the causes for which the order is claimed.

The plaintiff swears, "he has *ground to apprehend* that the defendant will make use of his possession to dilapidate and

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waste the fruits and revenues produced by the property and convert them to his own use."

The cause set forth in the affidavit, must be *essentially*, a legal one. In the present case we are referred, for the legality of the cause stated in the affidavit, to the *Code of Practice, art.* 275, *No.* 3. This requires *good ground* of apprehension.

The court is of opinion, that when the affidavit does not state any particular ground of apprehension, so as to enable the court to judge of it, he must at least bring his case within the words of the Code, and allege that he has *good ground*; otherwise the most futile pretexts and statements, would enable the party, to sequester the property of the defendant.

To obtain an order of sequestration of a tract of land, to prevent the possessor from committing waste and using the fruits and revenues, the affidavit must set forth *a legal cause* that the party obtaining it has *good ground* of apprehension, &c. It is insufficient to state he has *ground* to apprehend that the defendant will commit waste, &c.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed; and that the order of sequestration be rescinded; the appellee paying costs in this court.

GRIFFITH & WIFE *vs.* MINER.

APPEAL FROM THE COURT OF THE FOURTH JUDICIAL DISTRICT, THE JUDGE OF THE THIRD PRESIDING.

According to the 883d article of the Code of Practice, the appellant has three days, within which to file the record, after the return day of the appeal, or on cause shown within this period, he may obtain further time to bring it up.

The three days, after the expiration of which, the appellee is entitled to the clerk's certificate to that effect, if the record is not filed or cause shown, *are days of grace*, within which the appellant must file the record or show cause to the contrary.

After the expiration of the three days of grace, if the record be not filed or cause shown, the appellee has three alternatives; he may obtain the clerk's certificate, and proceed to the execution of his judgment; or he may file the record and have the judgment affirmed; and lastly, have the appeal dismissed.

The appellant may bring up and file the record, after the expiration of the three days of grace, and without showing cause, if the appellee has not availed himself of any of the alternatives allowed him, in case of the failure of the appellant to file it, within the three days grace.

It is the uniform practice of the Supreme Court, when without the fault of the appellant, his case cannot be placed before it to have a revision of the judgment of the inferior court on the merits, and when justice requires it, to remand the cause for a new trial.

The plaintiffs instituted suit against Stephen Miner, in his life-time, for the recovery of three hundred and ten arpents of land, situated in the parish of Concordia, which they allege, the wife of the plaintiff, formerly Eliza A. Walker, inherited from her mother, Ann B. Walker, deceased, late widow of Peter Walker. They allege, that said tract of land was confirmed to said Ann B. Walker, in her own right, by a *requette*, dated 15th September, 1802, by J. Vidal, then commandant of the post of Concordia, and by commissioner's certificate, the 25th April, 1811; that the said Eliza A. Griffith is the only heir of the said Ann B. Walker, deceased, and is entitled as such, to said tract of land. They allege, that the late Stephen Miner, formerly of Mississippi, now deceased, in his life-time took possession of the land in controversy, and has acquired large revenues and profits therefrom; and that the said land is now occupied and possessed by his heirs, since his death, and is in the actual possession and occupation of his son Stephen Miner, who claims it as his own, who has also acquired large revenues and profits therefrom, and who refuses to deliver it up, or to account for the profits and revenues. The petitioners pray, that the said Stephen Miner be decreed to deliver up said tract of land, and pay over to them the amount of revenues he has gathered.

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After answer put in by Stephen Miner, his death was suggested in a supplemental petition filed, and the widow, Mrs. Charlotte C. Miner, natural tutrix of the defendant's only child, made a party to defend this suit.

Mrs. Miner, for herself, and as natural tutrix of her child, answered, and denied that her late husband ever received any profits, accruing from the land in question, either from his father, or on his own account, that were not far exceeded in value, by the improvements made upon the land, and the taxes paid therefor; that her late husband derived title to the land, under the will of his father, and the deed of partition, between him and his brother William John Miner, in February, 1829; that his father, Stephen Miner, possessed said land by an open, notorious and uninterrupted possession, for more than twenty years before bringing this suit, and certainly more than ten years prior to said period, and that Ann B. Walker resided in the parish of Concordia, for more than twenty years immediately preceding her death, and more than five years elapsed, before institution of this suit, after the plaintiff, Eliza A. Griffith, came of age. She further avers, that Stephen Miner acquired said land, by a verbal sale or exchange made with Ann B. Walker, in 1807; and relies also for title, on a letter of said Ann B. Walker, written by herself, or by her authorised agent, or which was fully sanctioned by her, and which letter is annexed to the answer of said Miner.

The defendant further pleads prescription; and in case of defective title and eviction, she prays to be allowed ten thousand dollars for her improvements. She refers to the deed of partition between her late husband and Wm. John Miner, and prays that the latter be cited in warranty, and made to account for said land and profits, as by the act of partition he is bound, in case judgment is rendered against her; and that this suit be dismissed.

Upon these issues, after exhibiting a mass of testimony upon the merits of the matters in controversy, the jury returned a verdict for the plaintiffs, restoring them the land described in the petition, and allowing one thousand two

hundred dollars, for the rents and profits received by the defendants, since January, 1829, the time of bringing suit, and the costs; and for the defendant, against William J. Miner in warranty, in the sum of three thousand dollars, being half the value of the land recovered by the plaintiffs, and six hundred dollars for one-half of the rents and profits received, since the inception of suit. Judgment was rendered on the minutes, in conformity with the verdict, on the 7th December, 1832, and signed by the judge of the third judicial district, who tried the cause.

The counsel for the defendant, objected to the judgment being signed, on the ground, that the day on which it was signed, was not a judicial day, it being the day on which by law, the same court was required to commence its session, in the adjoining parish of Carroll, but waived all other objections. His objections were filed in writing, and are in the record.

An appeal was taken, which was granted on the 6th of December, 1833, returnable to the Supreme Court, at Alexandria, the first Monday of October, 1834. The record was brought up and filed by the appellant, on Thursday the 9th of October, 1834. The court did not meet and form a quorum to do business, until Wednesday the 8th. The record was therefore filed, on the second judicial day of the term, being the third day after the return day of the appeal.

The clerk of the District Court, who attended the trial of the cause, certified at the foot of the parole evidence, that the foregoing pages contained all the evidence taken, *viva voca* in the case.

On the same day, being the day judgment was rendered on the minutes, the district judge who tried the cause, certified, "that the foregoing pages contained all the parole testimony, on which the case was submitted to the jury;" and "that the documents marked, &c., contained all the documentary and written proof given to the jury."

At the time of granting the appeal, the original answer of Stephen Miner was mislaid or lost, which fact appeared by affidavits of the clerk, annexed to the record. The clerk

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who had succeeded to the office, at the time of granting the appeal, and who made out the record, certifies, "that the foregoing pages, from one to seventy-two, contains a true transcript of all the proceedings, as well as of all the documents *now on file, and of record*, and of all the evidence upon which the suit was tried, *so far as the said proceedings, documents and evidence, now appears among the records of my office.*"

An affidavit of the clerk, who was in office at the trial of the case, was filed in the record, who declared, that Charlotte C. Miner, tutrix of her minor child, and defendant in this cause, resided out of the state of Louisiana, with her said child, and continues to reside out of the same.

Dunbar, for the defendant and appellant, assigned for error on the face of the record, that the judgment appealed from, was signed by the judge, after the expiration of the term of the court, as fixed by law.

R. Ogden, Winn and Mason, for the plaintiffs, moved to dismiss the appeal for the following causes:

1. The record was not returned and filed in this court, at or within the time fixed by law, and the order of the appeal, in consequence of which the appeal is prescribed.

2. The appeal being suspensive, should have been taken and returned to the first term of the Supreme Court, succeeding the rendition of the judgment appealed from, to wit, at the October term, 1833.

3. The statement of facts is imperfect, and insufficient to enable this court, to try the case on its merits.

4. The appeal does not come up in such a shape, as to enable the court to examine the case.

5. The record is incomplete, a material document having been lost, since the trial of the cause in the District Court, which is established by the affidavit of the former, and the certificate of the present clerk.

6. The transcript is not certified by the clerk, as the law requires, so as to enable this court to know, that the whole case is before it.

Dunbar, for the defendant and appellant, stated that the causes, which prevented the record from being filed on the return day of the appeal, were beyond the control of the appellant, and for which he is not to suffer.

2. It is shown, that the appellant resides out of the state, and has two years to appeal in.

3. The certificate of the judge, at the foot of the record states, that it contains all the evidence, both parole and written, upon which the case was submitted to the jury. It is sufficient to try the cause on its merits. *Code of Practice*, 586.

4. But if it shall appear, at the time or before the trial, that the record is not complete, the appellant is entitled to have judgment suspended, until it be completed. *Code of Practice*, 898, 899.

5. If the case cannot be examined on its merits, we at least show, on the part of the defendant and appellant, that justice requires that the cause be remanded for a new trial.

Martin, J., delivered the opinion of the court.

The plaintiffs and appellees in this case, have prayed, that the appeal be dismissed, on the following grounds:

1. That the transcript had not been filed on the first day of the term, which was the return day thereof.

2. That the clerk's certificate is insufficient.

3. That an important document, viz: the answer of the defendant is missing, and made no part of the record.

The appeal was made returnable on the first Monday of October, 1834. On that day none of the judges attended. The roads were so much obstructed by the fallen timber, occasioned by the late storm, that rendered an attendance on the first days of the court, impossible. The clerk adjourned the court until the second day, when one of the judges arrived, who adjourned over until Wednesday, when all the judges were present in court, and which was the first judicial day. The transcript in the present case, was filed on the succeeding day, which was Thursday, and the second judicial day of the term. On this day, leave was asked and

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given, to file the transcript, but the counsel for the appellees, who was present, observed, that he reserved to himself the faculty of showing that the transcript was irregularly filed.

According to the 883d article of the Code of Practice, the appellant has three days within which to file the record after the return day of the appeal; or on cause shown within this period, he may obtain further time to bring it up.

The Code of Practice, *article* 883, allows to the appellant, who has not filed the record within the three days, after which the appellee is entitled to the clerk's certificate, the faculty within these three days, to obtain, on cause shown, further time to bring up the transcript.

In the case of *Rost* vs. *St. Francis church*, 5 *Martin, N. S.* 191, this court considered the three days, after which the appellee is entitled to the certificate of the clerk, *as days of grace*, within which the appellant may file the transcript. Until these days have elapsed, the Code of Practice does not seem to authorise any steps to be taken by the appellees, in relation to the disposition of the cause. After the expiration of this period, or that of any particular time, which the appellant may obtain from the court, the appellee has three alternatives: he may proceed to the execution of his judgment, by obtaining the clerk's certificate; he may require the affirmance of the judgment, and lastly, require the dismissal of the appeal. *Ibid.* 884. But the *Code of Practice* requires, before he proceed to the exercise of the two last alternatives, that he should bring up the transcript of the record. *Ibid.* 590. In the latter case, the dismissal is to be claimed, as if the record had been brought up by the appellant, and which, it is contended, excludes the neglect of the appellant to bring the record, from the causes which authorise the dismissal of the appeal.

The three days, after the expiration of which the appellee is entitled to the clerk's certificate to that effect, if the record is not filed or cause shown, *as days of grace*, within which the appellant must file the record or show cause to the contrary.

After the expiration of the three days of grace, if the record be not filed or cause shown, the appellee has three alternatives: he may obtain the clerk's certificate and proceed to the execution of his judgment; or he may file the record and have the judgment affirmed; and lastly, have the appeal dismissed.

We are not dissatisfied with the decision, in the case of *Rost* vs. *St. Francis church*. When an act is to be done within a given time, as the filing of an answer, and the like, it may be done afterwards, if nothing occurs which prevents it. Thus, if a judgment by default has not been taken, an answer may be put in to the merits, although more than ten days may have elapsed, from the service of citation.

The appellant may bring up and file the record, after the

We are, therefore, of opinion, the transcript of the record was filed in time.

The certificate of the clerk, attests the correctness of the transcript, so far "as the documents and evidence now appear among the records of the office."

It appears from the face of the transcript that the officer who subscribes the certificate, is of late appointment, who did not hold the office at the time the cause was tried. There is, however, a certificate of the judge, attesting that the record contains all the evidence given to the jury.

It is, however, admitted, that an important document is missing, viz: the original answer of Miner. An effort has been made to obtain a copy, and have it used on the trial in this court; and the clerk has certified, that the original is lost. This circumstance has been urged, as a ground for a claim, to have the appeal dismissed, because the appellant has not brought up such a transcript of the record, as will authorise this court, to revise the judgment appealed from.

As no fault or neglect can be attributed to the appellant, we cannot see any reason to dismiss the appeal, on account of an accident, over which he had no possible control.

The appellee has urged his inability, to proceed in the hearing of the case on its merits, without this document. As there is no legal means, by which evidence of its contents may be directly brought before us, no other steps can be resorted to, than to remand the cause to the tribunal, in which evidence of the contents of this missing document, may be legally received.

This requires the reversal of the judgment. Such has been the uniform practice of this court, that whenever, without the fault of the appellant, a case cannot be placed before it, in such a manner, as to enable the court to revise the judgment of the inferior tribunal, and when justice requires it, to remand the case for a new trial. *M'Daniel vs. Insall, ante* 241. 9 *Martin*, 92.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed, the verdict set aside, and the case remanded for a new trial; the plaintiffs and appellees paying costs in this court.

expiration of the three days of grace, and without showing cause, if the appellee has not availed himself of any of the alternatives allowed him, in case of the failure of the appellant to file it, within the three days grace.

It is the uniform practice of the Supreme Court, when without the fault of the appellant, his case cannot be placed before it, to have a revision of the judgment of the inferior court on the merits, and when justice requires it, to remand the cause for a new trial.

SMALL *vs.* FLINT & THOMAS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The plaintiff has a right, on proving his demand, to have a judgment by default made final, without waiting for it to be called regularly on the docket.

A judgment by default made final, will not be set aside for an answer to the merits, when the defendant can show nothing in his favor but his own *laches* and their fatal consequences.

Relief will be granted on a motion for a new trial, when it will not be extented to a case in which it is sought to set aside a final judgment, in order to make a valid defence to the merits.

This is an action by the holder of a negotiable note against the drawer and the payee as endorser, for five thousand seven hundred and fifty dollars, payable on the 1st March, 1834, with ten per cent. interest thereon from the 14th of May, 1833, until paid.

The petition alleges, that payment was demanded of the drawer and refused, of which the endorser had legal notice; and that payment hath been *ineffectually demanded;* wherefore he prays judgment against the defendants *in solidum* for the amount of said note and interest.

Judgment by default was taken by the plaintiff against the defendants, on the 30th April, 1834; and on the 6th of May following, the plaintiff's counsel made proof of the execution of the note, and the judgment by default was made final and signed by the judge.

On the 8th of May, two days afterwards, *Flint*, one of the defendants, filed his affidavit, alleging that he and his co-defendant had a valid defence to the action; that they had prepared answers to the merits of the case, but were taken by surprise when coming into court on the morning of the 7th May, and learning that the judgment was made

final; that there were fifty or sixty cases between the cause under trial, and this one, by which they were induced to believe, it would not have come on for several days, &c., that the judgment was obtained in an irregular manner, while a jury case was pending, and in a course of trial; they move the court that said judgment be set aside, that they be permitted to file their answers, which were annexed to the affidavit, and pray for such other order and decree as may be legal and just.

On the filing of this affidavit, with the answers annexed, the defendants in *propriâ personâ*, moved the court *ex officio*, to set aside the judgment taken by default, and order a new trial.

The district judge overruled the motion for a new trial, to which decision the defendants took a bill of exceptions. They then appealed.

Mason and Winn, for the plaintiff, contended that this case did not come within any of the rules or provisions of law, which permitted a final judgment to be opened or revised. It is not allowed by any of the modes pointed out in the Code of Practice, or settled by any decision of this court. *Code of Practice, article* 556, 312.

Flint, for the defendants, urged the equity and justice which required the judgment to be set aside on the ground of surprise, and that it was premature; and that there was a valid and meritorious defence to the plaintiff's demand.

2. He contended that there were no *laches* to be imputed to the defendants, when their defence was just and equitable. From the facts and circumstances set forth in the affidavit, the judgment should be set aside, and the answers permitted to be filed.

Martin, J., delivered the opinion of the court.

The defendants being sued as maker and endorser of a promissory note, failing to put in answers, and judgment by default was taken on the 30th of April, 1834, which was made final on the 6th of May following, and signed by the

judge. On the 8th of the same month, a motion was made by the defendants to have the final judgment set aside. The decision of the District Court overruling that motion, is the matter this court is now called on to revise.

The motion was based on the affidavit of the maker of the note, setting forth the following facts.

The suit commenced during the April term, 1834. There were then on the docket before this suit between fifty and one hundred others, which were jury cases, and were neither decided nor called up for trial. The attention of the court, at the time the motion was made, had been engrossed since the first of the month, instant, by a jury case of considerable importance and great detail; so that no other case could have been regularly taken up. Both defendants daily and constantly attended the court, and neither of them saw or heard of any other case being acted on in the meanwhile, except the present, which could not have been reached in the regular course. One of the defendants arrived at the court-house on the morning of the day on which the judgment appears to have been made final, a few minutes after the opening of the court, and was assured by some one present that nothing had been done, but to read the minutes. The case already mentioned was still before the jury, and both the defendants were ignorant, until the minutes of the court were read on the morning of the seventh of May, of the judgment having been made final. They had communicated to the attorneys of the plaintiff their intention of making a defence; and did not expect after this, that the judgment would have been made final until the cause was regularly reached on the docket. The defendants further urged that they had, by the conduct of the plaintiff, been deprived of the means of making a legal, valid and equitable defence to the merits of the action, viz: that the note sued on had been given to the plaintiff in lieu of a former one given him for the price of eleven negroes, and which three months after the sale, was alleged to have been lost; that three of the negroes so purchased had died, and others were languishing from redhibitory maladies, whereby the defendants were entitled to a diminution of the price.

The judgment by default is admitted to have been properly taken, and the question is narrowed down to a simple point: Was it properly and regularly made final?

On the part of the plaintiff, it is contended that it was. His attorney might have required that it be made final three days after the default had been taken, *i. e.* on the *fourth* of May. Out of courtesy to the defendants, he waited until the sixth, when he considered his duty to his client forbade a further delay; that the notice of an intention to make a defence had been given before the institution of the suit; that judgments by default are made final three days after the first judgment is rendered, and there is no necessity to wait, as in contested cases, until they are regularly reached in the progress of the business of the court, in calling the docket.

The plaintiff has a right, on proving his demand; to have a judgment by default made final, without waiting for it to be called regularly on the docket

On the part of the defendants, it cannot be seriously contended that they have not been guilty of some *laches;* but they urge the District Court ought to have considered that the penalty claimed by the plaintiff mulct them to the amount of thousands of dollars, while the injury which he might sustain, if they were relieved, was a short delay only. This court has been referred to the case of *Randal* vs. *Bayon*, 4 *Martin, N. S.* 132, in support of the present application.

The court cannot say that any impropriety of conduct can be attributed to the plaintiff or his attorney. If the defendants suffer, it is in consequence of their own *laches.*

A judgment by default made final, will not be set aside for an answer to the merits, when the defendant can show nothing in his favor but his own *laches* and their fatal consequences.

The plaintiff is in possession of a judgment by default, regularly made final. The defendants can offer nothing to induce us to set aside this judgment, but their own *laches* and their fatal consequences.

The case of *Randal* vs. *Bayon*, 4 *Martin, N. S.* 132, was one in which relief was granted on a motion for a new trial. The present case is that of a definitive judgment, sought to be set aside.

Relief will be granted on a motion for a new trial, when it will not be extended to a case in which it is sought to set aside a final judgment, in order to make a valid defence to the merits.

There is a prayer for damages, on account of the frivolous appeal. Although both the defendants are members of the bar, this court will indulge the belief, that they have been induced to hope, they might obtain relief at our hands, by the too favorable view in which men are apt to consider their

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own cases. Perhaps the plaintiff's claim to damages, is rendered less forcible, by the consideration of his having availed himself of the opportunity, which the defendants have given him (although unwillingly), of bringing his suit to a favorable issue. We do not consider this such a case, as requires the infliction of heavy damages, none are consequently awarded.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

BENSON *vs.* MATHEWS.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Credits or other writings not signed, endorsed on the back of a note or act, which is in the possession of the creditor, and tend to liberate the debtor, and are crossed out or erased, must be considered as entitled to credit.

An *erased* credit on a note in possession of the creditor, is not conclusive proof of payment, but may be repelled by other proofs or presumptions to show it was endorsed on the note erroneously.

So where two credits, one of four hundred dollars and one of three hundred and eighty dollars, were endorsed on a note in the possession of the creditor, and the former was erased, both endorsements appearing to be made on the same day: Held, that the erasure was proper and the credit erroneously endorsed, when on weighing the presumptions arising from all the circumstances of the case, they preponderate in favor of the creditor.

This is an action on a promissory note executed by the defendant on the 15th January, 1824, to M. Wells, for one thousand seven hundred dollars, with ten per cent. interest until paid; who endorsed it to the plaintiff, deducting for credits

six hundred and sixty-eight dollars, credited the 20th January, 1825; three hundred and eighty dollars, the 26th April, 1826, and one hundred and twenty dollars, the 16th March, 1825, making in all one thousand one hundred and sixty-eight dollars. The plaintiff prays judgment for the balance, which he alleges is due on said note, and that certain slaves which were mortgaged to secure its payment be seized and sold to satisfy the same.

The defendant pleaded a general denial; and that he has made payments which more than extinguish the balance due on said note, viz: in February, 1827, he paid seven bales of cotton, worth three hundred and fifteen dollars, and in April, 1826, four hundred dollars, and that he transferred a judgment on Curtis's estate, amounting in principal and interest to six hundred and twenty dollars, making in all one thousand three hundred and thirty-five dollars, which leaves a balance of one hundred and sixty-seven dollars, of principal due him, for which and all accruing interest he prays judgment in re-convention.

The court after calculating interest and deducting payments, gave judgment in favor of the plaintiff for one hundred and ninty-four dollars and fifty-two cents, and interest from the time this balance was payable. The defendent appealed.

Flint and Thomas, for the plaintiff, submitted the case on a brief explanation.

Winn, contra, contended that a credit of four hundred dollars had been endorsed on the note, and was erased while the note was in the possession of the plaintiff and which must be allowed unless satisfactorily accounted for.

Bullard, J., delivered the opinion of the court.

This suit was instituted by the plaintiff as endorser, to recover of the maker, an alleged balance due on his promissory note. He alleges in his petition, that there is a credit on the note, of three hundred and eighty dollars, paid on the 26th of April, 1826, together with other credits, and the

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original note was annexed to the petition. The defendant admitted the execution and endorsement of the note, but denied that there is any balance due. He alleges, that on the 26th of April, 1826, he paid four hundred dollars, which has not been credited on the note, and that about the month of February, 1827, he paid seven bales of cotton, worth three hundred and fifteen dollars. That in fact he has, through error, overpaid the note, and he demands judgment in re-convention, for the amount thus overpaid.

On these issues the cause was tried below, and judgment having been rendered against the defendant, for a balance of about two hundred dollars, he appealed.

It was agreed, that the original note sued on, should be annexed to the transcript, and submitted to the inspection of this court. But it is not now before the court, although in his return to a *certiorari*, the clerk of the District Court, states, that it was sent up according to agreement. Under these circumstances, by consent of parties, we are authorised to examine the case upon its merits, according to the evidence in the record, dispensing with the original note, and even a copy of it.

One of the witnesses says, that there appears to be a credit on the note, for four hundred dollars, bearing date, April 26, 1826, which appears to have been erased, and that there is another credit on the note of the same date, for three hundred and eighty dollars.

It is contended, by the counsel for the appellant, that he is entitled to both these credits, unless the plaintiff satisfactorily accounts for the erasure, and that allowing that credit, the note has been overpaid, and he is entitled to recover back, in re-convention, the surplus.

Credits or other writings not signed, endorsed on the back of a note or act, which is in the possession of the creditor, and tend to liberate the debtor, and are crossed out or erased, must be considered as entitled to credit.

The general principle appears to us well settled, and we need refer to no other, as we could to no higher authority than Pothier in support of it: "Quand même les écritures non signées qui sont au bas ou au dos d'un acte qui est en la possession du créancier, et qui tendent à la libération de ce qui est porté par cet acte seraient barrées, elles ne laisseraient pas de faire foi; car il ne doit être au pouvoir du créancier

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An *erased* credit in a note in possession of the creditor is not conclusive proof of payment, but may be repelled by other proofs, or presumptions, to show it was endorsed on the note erroneously.

en la possession duquel est l'acte, ni moins encore en celui de ses héritiers en barrant cette écriture, de détruire la preuve du paiement qu'elle renferme." 2 *Pothier Ob. No.* 726.

This proof, in favor of the debtor, like most others, is not final and conclusive, but may be repelled by other proofs, either of facts or presumption, which tend to convince the mind, that the erased credit was in fact endorsed on the note erroneously, and that only three hundred and eighty dollars were paid on that day, instead of seven hundred and eighty dollars.

The question, therefore, presented for the solution of the District Judge, and which we are called on to reverse, was one of fact alone, and we proceed to receive the evidence on both sides furnished by the record.

On the part of the defendant, he shows an acknowledgement on the back of the note, of two credits on the same day; it does not appear in whose hand writing: the one for four hundred dollars erased, and the other for three hundred and eighty dollars which is admitted in the petition.

On the part of the plaintiff, his attorney, sworn as a witness, says, that in his frequent conversation with the defendant, he never pretended to claim the amount credited and erased, and that since suit was brought, he contended that he had nearly paid the note. In the next place he has in his favor the presumption arising from the possession of the note, from the improbability of a note of seventeen hundred dollars, being so largely overpaid, from the fact, that afterwards, two other payments were made, the one in the transfer of a judgment against Curtis, and the other in seven bales of cotton. The presumption arising from the fact, that the creditor retained possession of the note is increased by another, to wit: that the payment was secured by a mortgage on certain property of the defendant, and he took no steps to cause the mortgage to be cancelled. The declaration of the defendant, that he had nearly paid the note, was a negative admission that it was not entirely paid. Few men are so careless as to forget the payment of four hundred dollars. The District Judge had before him the original paper, and could perceive

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So where two credits, one of four hundred and one of three hundred and eighty dollars, were endorsed on a note, in the possession of the creditor, and the former was erased, both endorsements appearing to be made on the same day: *Held*, that the erasure was proper and the credit erroneously endorsed, when on weighing the presumptions arising from all the circumstances of the case, they preponderate in favor of the creditor.

whether the two credits were in the same hand writing, and whether the erasure was with the same colored ink, and therefore, probably made at the same time, merely to correct the amount of the credit, to which the defendant was entitled.

The defendant in his answer, alleges, that he paid four hundred dollars on that day, which has not been credited on his note, and at the same time, relies in support of his allegation, on the credit which is endorsed, and which had been erased. Nothing is said in his answer about the erasure, and while he addresses himself to the conscience of his adversary, to obtain evidence of the payment of seven bales of cotton, delivered a year afterwards, he forbears to interrogate him on the subject of the more important item of four hundred dollars. After weighing these presumptions, the court below, rendered judgment in favor of the plaintiff, for a small balance, and according to the uniform rule of decision in this court, in matters of fact, we cannot say, that the judgment is clearly erroneous.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

TALIAFERRO *vs.* KING ET ALS.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The service of citation without the petition of appeal, is defective and insufficient. The Code of Practice, articles 581-2, expressly require the service of both.

When the service of the process of appeal is defective and insufficient, the appeal will be dismissed on the motion of the appellee.

This is an injunction case. The plaintiff obtained an injunction to stay an execution which issued against him, in the name of the widow and heir of Thomas A. King, for seven hundred dollars, on the ground, that, since obtaining the judgment, on which said execution issued, he purchased a claim against the estate of Thomas A. King, now deceased, amounting to one thousand dollars, which he offers in compensation of the judgment and execution against him. The clerk of the District Court, for the parish of Catahoula, in which the parties reside, granted the injunction and stayed all proceedings, until they could be heard on their respective claims.

On motion, the district judge dissolved the injunction, on the ground that the case was properly cognizable by the Court of Probates, and that the District Court was without jurisdiction. The plaintiff in the injunction appealed.

The appeal was allowed, returnable to the Supreme Court at Alexandria, on the first Monday of October, 1834.

The sheriff of Catahoula, in making service of the appeal, made the following return on the back of the original citation: "Served on Mrs. Mary King, the copy of the *within notice*, on the same day as received. 3 September, 1834."

Winn for the defendants and appellees, moved to dismiss the appeal for want of legal service. The sheriff's return

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PRUDHOMME vs. VIENNE'S ESTATE.

The service of the citation without the petition of appeal, is defective and insufficient. The Code of Practice, articles 581—2, expressly require the service of both.

When the service of the process of appeal is defective and insufficient, the appeal will be dismissed on the motion of the appellee.

shows there was no copy of the petition served on the appellees, as is required by law.

Thomas, contra.

Martin, J., delivered the opinion of the court.

This case comes before the court on a motion to dismiss the appeal. The dismissal is claimed on the ground of defective service of the appeal on the appellee. It appears that a copy of the petition of appeal did not accompany the copy of the citation.

The service of the citation, without the petition of appeal, is defective and insufficient. The Code of Practice, articles 581, 582, expressly require the service of both.

The appeal must, therefore, be dismissed.

PRUDHOMME, CURATRIX *vs.* VIENNE'S ESTATE.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF NATCHITOCHES.

Where creditors agree, to allow a syndic five per cent. commission on the *real amount* he may have in his hands in the course of his administration, he is only intitled to a commission on the amount of *moneys actually received* by him, and not on the amount of notes or property which came into his hands.

By the act of 1817, the commission of syndics cannot exceed five per cent.; and if the first syndic is allowed full commissions on the property which came into his hands, his successor, to whom it is delivered for final distribution, would be intitled to nothing.

The 1676th article of the *La. Code*, relates only to executors, and restricts their commissions to two and a half per cent. on the amount of the inventory, when they have had seizin of the whole estate.

The plaintiff, as curatrix of the succession of her deceased husband, claims a commission of five per cent. on the aggregate amount of certain notes, which came into his hands as syndic of the estate of François Vienne, and which were delivered over to the present syndic. The amount of notes and debts due the estate of Vienne, which passed through the hands of the plaintiff's deceased husband while acting as syndic, was eight thousand four hundred and ninety-five dollars and ninety-three cents, on which she claims five per cent., amounting to four hundred and twenty-four dollars and seventy-nine cents. She alleges she has demanded this sum from A. Sempeyrac, at present syndic of Vienne's estate, who refuses to allow her claim; wherefore, she prays judgment therefor, with interest and costs.

The syndic pleaded the general issue; and that the plaintiff, or her husband in his life-time, while syndic, received the amount to which he was entitled.

The evidence shows that the plaintiff's husband was appointed syndic of Vienne's estate by the creditors thereof, who declare "he is entitled to receive for his services, a commission of five per cent. *on the real amount he may have in his hands, in the course of his administration.*"

It is also admitted, that the account claimed, is for commissions on uncollected notes, delivered over to the syndic, the present defendant, after the death of the former syndic.

The probate judge was of opinion, that by the words *real amount*, in the *procès verbal* of the deliberations of the creditors, it was evidence of their intention to allow the commission only on *money actually received by the syndic*, and not for the trouble of having the property sold and taking notes therefor. Judgment being for the defendant, the plaintiff appealed.

This case was submitted, after brief explanations by *Mr. Barry* for the plaintiff, and *Gen. Thomas*, for the defendant.

Bullard, J., delivered the opinion of the court.

The only question presented by the pleadings in this case, is whether a syndic, who administers an insolvent succession, under an agreement with the creditors, that he shall receive

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a commission of five per cent. on the real amount received by him, be entitled to charge that commission on notes due to the succession, not collected by him, but handed over to his successor. The expressions used by the creditors, in their deliberations, are, "that the said syndic should be entitled to receive for his services in that capacity, a commission of five per cent., on the real amount he may have in his hands, in the course of his said administration, agreeably to law." It is evident the creditors contemplated that the syndic should continue to administer fully on the estate, convert the property into money, and distribute it among the creditors. But he died before the administration was closed, and another syndic was appointed, and the notes given by purchasers at the sale of the estate, were handed over by his representatives to the new syndic.

Where creditors agree to allow a syndic five per cent commission on the *real amount*, he may have in his hands in the course of his administration, he is only entitled to a commission on the amount of *moneys actually received* by him, and not on the amount of notes or property which came into his hands.

We concur in opinion with the judge *à quo*, that the creditors intended to allow the syndic a commission only on the amount of moneys actually received by him, in the course of his administration. The promissory notes of purchasers, do not, in our opinion, constitute a real amount in his hands. By the act of 1817, the commissions cannot exceed five per cent., and if the first syndic in this case, were to be allowed full commission on the notes in question, his successor, who is to collect them and distribute the proceeds among the creditors, would be entitled to nothing.

By the act of 1817, the commissions of syndics cannot exceed five per cent; and if the first syndic is allowed full commissions on the property which came into his hands, his successor, to whom it is delivered for final distribution, would be entitled to nothing.

The 1676th article of the Louisiana Code, on which the appellant relies, does not appear to us to support her pretensions. That article relates only to executors, and restricts their commissions to two and a half per cent., on the amount of the inventory, when they have had seizin of the whole estate.

Article 1676 of the La. Code relates only to executors, and to two and a half per cent. on the amount of the inventory when they have had seizin of the whole estate.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

DAY *vs.* MARTIN.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Where it appears, that the plaintiff in execution was prevented from making his debt out of property seized by the wrongful suing out an injunction, the surety in the injunction bond, is liable in damages for an amount not exceeding the penalty of the bond.

Although a judgment enjoined, draws interest until paid, the claim of the plaintiff, against the surety in the injunction bond, is for damages *not liquidated*, which do not carry interest, and cannot exceed the penalty of the bond.

This is an action, instituted by William Y. Day, as assignee of Edward A. Day, on an injunction bond executed in favor of the latter, by the defendant Wm. C. C. C. Martin, as surety for Robert Martin, in the penalty of one thousand five hundred dollars.

The plaintiff alleges, that in 1827 he issued his execution, for a balance of a judgment against Robert Martin, of more than two thousand dollars, and levied it on four slaves, which was enjoined by the defendant therein, and the bond sued on executed for only the sum of one thousand five hundred dollars. He alleges, that said injunction was wrongfully sued out, and was dissolved and dismissed, at the November term, 1829, of the District Court for the parish of Rapides; that he sustained great damage, in consequence of the suing out said injunction, amounting to more than the penalty in the bond. He prays judgment against the defendant, for the penalty of the bond.

The defendant denied, generally and specially, that the plaintiff had any right to sue, or that any injury was sustained by the obligee of the bond; and if any, it was released by prescription and the *laches* of the party, in not recovering the debt from the principal in the bond.

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The plaintiff proved a regular assignment of the original judgment, against R. Martin, to himself.

The record of the injunction suit, is also in evidence. R. Martin alleges in his petition for the injunction, that he only owed about one thousand dollars on Day's judgment, and that four of his slaves were seized to pay said balance; but that he had made a further payment of twenty-five bales of cotton, which was not credited, and conveyed a valuable tract of land, which Day was to sell, pay himself out of the sale, and account to him, which he has failed to do; that E. A. Day is dead, and his brother is setting up a fraudulent claim to said judgment. Day joined issue on the injunction, and on the 11th day of November, 1829, it was dissolved and dismissed.

It further appeared in evidence, that since obtaining the injunction, R. Martin removed to Texas. This was about 1830. That the negroes seized, and released by the injunction, were soon after sold to pay other debts, and one of them died.

The district judge, after hearing all the evidence in the case, rendered judgment for the plaintiff, for one thousand one hundred and twenty-one dollars and fifty cents, with ten per cent. interest, from the 18th August, 1830, until paid; and for fifty dollars attorney's fee, in dissolving the injunction, and the costs of suit. The defendant appealed.

Boyce, for the plaintiff.

Winn and Mason, for defendant.

Bullard J., delivered the opinion of the court.

The plaintiff, as assignee of E. A. Day, claims of the defendant, as surety of R. Martin, on an injunction bond, damages alleged to have been sustained by him, in consequence of the wrongful suing out of a writ of injunction, to stay proceedings on an execution, in virtue of which, the sheriff has levied on four slaves, the property of the principal.

He alleges, that the injunction was afterwards dissolved, as having been wrongfully issued, and that in the meantime, one of the slaves died. Another was sold, at the suit of another creditor, and the others cannot be found. The defendant pleads substantially the general issue, denying the right of the plaintiff, and alleging that the action is barred by prescription, and that the defendant is released by the laches of the plaintiff, in not pursuing the proper steps to recover from the principal.

Where it appears that the plaintiff in execution was prevented from making his debt out of property seized by the wrongful suing out an injunction the surety in the injunction bond is liable in damages for an amount, not exceeding the penalty of the bonds.

Although a judgment enjoined draws interest until paid, the claim of the plaintiff against the surety in the injunction bond, is for damages, *not liquidated*, which do not carry interest, and cannot exceed the penalty of the bond.

The evidence offered by the plaintiff, shows the execution of the bond, the assignment to him, the dissolution of the injunction, and the loss and total dispersion of the property, out of which the execution might have been satisfied, if the injunction had not been granted. One of the slaves is shown to have died, and it is contended by the defendant's counsel, that the loss ought not to fall on him. The court of the first instance, appears to have been satisfied, that if the injunction had not been granted, that slave, together with the others, would have been sold for the benefit of the plaintiff; and the loss of them being a direct consequence of the stay of proceedings, the defendant is responsible. It appears to us satisfactorily, that the plaintiff has been frustrated in the recovery of his debt, by means of the wrongful injunction, and that the defendant is liable in damages, for an amount not exceeding the penalty of the bond. But the court below has, in our opinion erroneously, given a judgment, which, on computing interest at ten per cent., makes the amount greater than the penalty sum. Although the original judgment bore interest until paid, the claim of the plaintiff against the surety is for damages not liquidated, and which consequently do not carry interest. The balance due on the 18th of August, 1830, is admitted to be one thousand and nine dollars. Adding to this the interest, which had accrued at the time of the trial, and a reasonable allowance for expenses, incurred in defending the suit in injunction, will make about fourteen hundred dollars, which we think the plaintiff entitled to recover.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be reversed; and proceeding to give such a judgment as ought, in our opinion to have been rendered in the District Court, it is further adjudged and decreed, that the plaintiff recover of the defendant, the sum of fourteen hundred dollars, with costs in the District Court, those of the appeal to be paid by the plaintiff and appellee.

DUNLAP *vs.* BAILEY, EXECUTOR, &c.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF RAPIDES.

Where an executor is appointed, and directed in the will, to sell the property of the testator, and deliver the residue of the proceeds to the heir, he is authorised to take possession and sell it, without the *seizin* of the estate being expressly *given*.

The plaintiff, as attorney of the absent heirs of Jules Belot, deceased, applied to the judge of probates, for the parish of Rapides, for an injunction to restrain the defendant, as testamentary executor, from selling the property of said decedent, on the ground that he had *no seizin* of the property of the estate, given to him by the will. The petition alleges, that the executor has taken illegal possession of the effects of said estate, and has sold part of it, without any order or authority of court, and has advertised the real estate and slaves for sale, also without authority. The petitioner prays, that the executor be enjoined from proceeding any further, or from exercising any right of possession or disposal of said property, until he gives bond with security, for the faithful administration thereof.

On the first of November, 1832, Jules Belot made his olographic will, in which he declares, "after the payment of my debts, which will be operated by the sale of my house and lot, and all the goods and moveables that I may own at my death, I give unto my father for his life-time, my negro girl Vinia, who is to be free at his death;" and any balance

arising from the sale of his property, after paying his debts, he bequeathes to the foundling hospital in Paris, &c. His father having died before him, the testator, on the 12th September, 1833, made the following codicil to his will:

"My father being dead, the dispositions in his favor are by this subsided, but it is my wish, that the balance of the clauses of the said will, remain the same as heretofore; and to insure it the better, I nominate Mr. Wm. Bailey for my testamentary executor, and beg of him to make his best exertions, to send to my daughter the whole of my property, or to send for her in France, and put her in some respectable house of this country, where she can get a good honest education, and for this last service, that I will receive of him, I give him *ten per cent.*, on every net sum that will be collected out of my estate."

The will was admitted to probate, on the 8th July, 1834. The executor proceeded to take possession of the property, and dispose of it under the will. The plaintiff, as attorney for the absent heirs, was of opinion, the executor was not entitled to the *seizin*, by the terms of the will, applied for an injunction, which was refused by the probate judge. The plaintiff appealed from the order of *refusal*.

The only documents and evidence, upon which the proceedings were had, was the petition and copy of the will. The probate judge granted the appeal.

The case was explained by *Mr. Dunlap, in propriâ personâ*, and by *Mr. Dunbar*, for the defendant.

Martin J., delivered the opinion of the court.

The plaintiff being attorney of the absent heirs of Belot, is appellant from the decision of the Court of Probates, refusing to enjoin the defendant from exercising any right, or act of possession, in relation to the property belonging to the estate of Belot, until he shall first give bond and security for his faithful administration.

The injunction was prayed for on a suggestion, that the will does not give the seizin of the property of the estate to the executor; and that the latter had, notwithstanding this

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want of authority, advertised the property for sale, and was about to sell it, without first obtaining the order of the Court of Probates, for that purpose.

It is admitted on the part of the defendant, that the property was offered for sale, without any order of court, but that this was an error which has since been cured.

The testator directs, that the payment of his debts be effected by the sale of his house and lot, and of his goods. He bequeathes to his father a life estate in a slave, who is to be emancipated after his death. Whatever is left from the sale of his estate, after the payment of his debts, he gives to a hospital in Paris, in France, for the benefit of his daughter, whom he left there.

The father dying first, the testator by a codicil appointed the defendant his executor, and directed him to send his property to his daughter.

Where an executor is appointed, and directed in the will, to sell the property of the testator, and deliver the residue of the proceeds to the heir, he is authorised to take possession and sell it, without the *seizin* of the estate being expressly *given*.

It appears from the will, that the testator made his daughter his universal legatee, and directed his executor to transmit the residue of his estate to her. This could not be effected in any other mode than by a sale of the property. It could not be made in kind as respects the house and lot, or the slave, even if the latter be not entitled to her freedom. The executor could not execute the will, without taking possession of the property and selling it, when the heir was in France. The Court of Probates did not, therefore, err, in refusing the injunction.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Probate Court be affirmed, the appellant paying all costs.

CLARY *vs.* GRAYSON.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

In the division of the parish of Ouachita, and establishment of the parish of Carroll, in 1832, the law provides that the taxes for 1831, in the part embraced by the new parish of Caroll, shall be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Caroll: *Held*, that the sheriff who came into office in Ouachita, after the taxes were collected, was not responsible for their payment; and for any sums he collected as deputy of his prodecessor, he is not liable except to his principal.

This suit is instituted by the plaintiff, as sheriff of the parish of Carroll, demanding from the defendant a sum of money, which he alleges the latter collected as taxes due in the parish of Carroll, while acting as sheriff of the parish of Ouachita. The petition charges that by the 13th section of the act of the 21st March, 1832, the amount of the parish tax of 1831, due by the inhabitants of the parish of Carroll, shall be collected by the sheriff of the parish of Ouachita, and by him paid over to the sheriff of Carroll; and further charges, that the defendant as sheriff has collected said taxes to the amount of three thousand dollars, which he has refused and failed to pay over to him (the plaintiff), who was duly qualified as sheriff of Carroll, and authorised by law to receive the same. He further alleges that by the wrongful detention of said sum, the inhabitants of the parish of Carroll, and he as sheriff thereof, sustained damages to the amount of one thousand dollars. He prays judgment for said sum and damages; and that the defendant answer interrogatories: 1. Have you not collected of the inhabitants of that part of the parish of Ouachita, included in the parish of Carroll, three thousand dollars, parish tax for the year 1831? 2. If you have not collected that amount, state precisely the sum you have collected? 3. Have not said taxes been demanded of you?

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The defendant pleaded a general denial. That the law of the legislature, relied on by the plaintiff, is unconstitutional: that the money claimed by the plaintiff was appropriated by the parish of Ouachita, previous to said act of the legislature, relied on, being enacted. He further pleads the prescription of one year, against any damages which may be claimed of him.

To the first interrogatory he answers, he does not know the exact amount of taxes he collected. That Jonathan Morgan, who was the sheriff of Ouachita, collected some of the taxes referred to, some were collected by this respondent as deputy sheriff, and some by another deputy of said Morgan, in all about two thousand one hundred dollars. 2d. He has answered this interrogatory in his answer to the first. 3d. To this he answers yes.

It was admitted that the plaintiff was sheriff of Carroll, at the institution of this suit; that Jonathan Morgan was sheriff of Ouachita, and collector of the parish taxes for 1831, and continued as such until March, 1832. That on the 10th March, 1832, the defendant, who had previously been the deputy of Morgan, was commissioned sheriff of the parish of Ouachita, and gave bond and qualified on the 24th of that month.

The evidence showed that the parish taxes for 1831, were collected and credited in the account of Jonathan Morgan, as sheriff, on the books of the parish treasurer of the parish of Ouachita, that they were collected in part by the defendant and paid over from time to time; that in the month of September, 1832, the parish treasurer of Ouachita, made a settlement with the sheriff of Carroll, when the parish taxes of Carroll, amounted to two thousand one hundred and seventy-four dollars and seventy-nine cents, subject to a credit of two hundred dollars. That the whole of said parish taxes for 1831, were charged to J. Morgan, as sheriff of Ouachita, and collector thereof, on the 15th November, 1831, and that all the payments of said taxes so charged, were credited to his account accordingly.

The act of the legislature, establishing the parish of Carroll, passed in March, 1832, section 13, provides, "that the

amount of parish tax for 1831, due by the inhabitants of that part of the parish of Carroll, shall be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Carroll."

The district judge rendered judgment in favor of the plaintiff, against the defendant, for one thousand nine hundred and seventy-four dollars and seventy-nine cents, with interest and costs. The defendant appealed.

Winn, for the plaintiff, considered, as the defendant had received the taxes, due to the parish of Carroll, for 1831, although not sheriff at the time they were all collected, or when the law passed, yet having received them, as was shown by the evidence, he held them subject to this law, and was bound to account for them accordingly.

Barry, for the defendant, contended that the taxes of 1831, were appropriated by the police jury of Ouachita, before the passage of the act of 1832, and before the parish of Carroll existed, or was taken from Ouachita.

2. The operation of the law, under which these taxes are claimed, would be retrospective, and the law unconstitutional.

3. The taxes now demanded, were collected by the former sheriff, and if any one is liable to this action, it is him. The present defendant cannot be sued for this claim.

Mason, for the plaintiff, in reply.

1. The act of the legislature, under which this claim is made, is constitutional, because it is only directory to the sheriff, in paying over the taxes collected within the bounds of the new parish of Carroll.

2. The present sheriff is properly sued, because he was in office, before this money was appropriated by the police jury of Ouachita, and collected part of it himself.

Bullard, J., delivered the opinion of the court.

The act of the Legislature, approved, March 14th, 1832, providing for the establishment of the new parish of Carroll,

composed of a part of that of Ouachita, and a part of Concordia, provided among other things, that the amount of parish tax for 1831, due by the inhabitants of that part of the parish of Ouachita, forming the parish of Carroll, should be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Carroll. In pursuance of that statute, the present suit was instituted by the one sheriff against the other, alleging that the defendant as sheriff of the parish of Ouachita, has collected the tax to the amount of three thousand dollars, and refuses to pay it over. The plaintiff prays judgment for that amount, and one thousand dollars damages.

The defendant put in for exception, that he was not the sheriff, and had no authority to collect the taxes in question, but that Jonathan Morgan was the sheriff at the time, and the only person responsible. This exception being overruled, the defendant pleaded on the merits, and judgment being rendered against him, he appealed.

In the division of the parish of Ouachita, and establishment of the parish of Carroll, in 1832, the law provides that the taxes for 1831, in that part embraced by the new parish of Carroll, shall be collected by the sheriff of Ouachita, and by him paid over to the sheriff of Carroll: *Held*, that the sheriff who came into office in Ouachita, after the taxes were collected, was not responsible for their payment; and for any sums he collected as deputy of his predecessor, he is not liable except to his principal.

The evidence shows, that Morgan was the sheriff of Ouachita, at the time the tax of 1831 was collected, that a part of it was collected by the present defendant, then acting as deputy, and by other deputies, and that the amount was paid over by him to the parish treasurer, and credited to the account of Morgan, his principal, and that he entered on the discharge of his duties as Morgan's successor, on the 24th of March, 1832, after which period it does not appear, that any part of the tax was collected.

It appears to us clear, that the statute did not impose on the present sheriff, the duty of collecting the tax, because he was not sheriff at the time it was collected, and that for the sums received by him as deputy, he was responsible only to his principal. In the capacity in which he is sued, he shows that the law imposed no duty upon him in relation to that tax, because he was not the official collector for the tax of 1831, and having paid over to his principal the sums collected, as deputy, he is no longer accountable even to him.

It has been urged, that Jonathan Morgan, being *functus officio*, is no longer liable to be sued as sheriff. To that it may be answered, that if the statute in question, imposed a

duty upon him, which he neglected to perform, he rendered himself personally liable. It is, however, certain, that he was out of office before the passage of the act.

We forbear to touch the question, whether according to the fair construction of the statute, or the general principles of law, the two parishes are bound to make an equitable partition of any funds existing in their common treasury at the time of their separation. That question does not properly arise between the present parties.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and judgment is here rendered in favor of the defendant, with costs in both courts.

EVERETT *vs.* M'KINNEY AND WIFE.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF CONCORDIA.

The Court of Probates will not entertain jurisdiction of a suit against a curator of an estate to recover the property which it is alleged, has been irregularly sold, and especially, when the purchasers are not made parties.

The Probate Court, cannot inquire directly into the title to real estate, though there are cases in which it may be done incidentally.

It is not enough to allege that a defendant is curator of an estate, to give jurisdiction to the Court of Probates, of the subject matter, not in itself of probate jurisdiction.

The plaintiff alleges he is the lawful heir of one William Hyman, deceased, whose succession has been opened in the parish of Concordia, and that it consists of a tract of land, slaves, stock of cattle, plantation implements, crops gathered, rights and credits, amounting to about twelve thousand

dollars, which property belonging to said estate, was sold by the widow of said Hyman, without the authority and formalities of law; there being no counsel for absent heirs appointed to attend the taking of an inventory, and no account of any administration was rendered for several years, as required by law. He alleges that said proceedings are null and void; and that the widow has since intermarried with one George G. M'Kinney, to one or both of whom, letters of curatorship have been granted: He, therefore, prays, that they be cited, that an attorney for absent heirs be appointed, and that he may be recognized as heir of the said William Hyman, deceased; that the sale of said estate, and all the proceedings had in this court, in relation to it, may be annulled, and that he be put in possession thereof.

On the 10th December, 1832, the defendants filed their answer, denying, generally, the plaintiffs demand; and specially his heirship and right to sue, &c.

On the 10th July, 1833, the defendant filed his peremptory exception to the petition; alleging he was not bound to answer to the merits, because the Probate Court had no jurisdiction of the case, and prayed that it be dismissed.

The judge of probates, rendered judgment on this exception, dismissing the cause; first, because the title to immoveables is involved, of which the Probate Court has no jurisdiction; second, the property is alleged to have been sold, and must be in the hands of third persons, whose rights cannot be decided on, without making them parties. The plaintiff appealed.

R. Ogden and Winn, for the plaintiff, explained the case. They contended, that the Probate Court had jurisdiction of the matters set up by the plaintiff in his petition, and was the proper tribunal in which she should present his claim, and he recognised as heir.

Dunbar, for the defendant, replied, that the plaintiff's action could not be maintained. The sales of the property claimed, cannot be annulled, without making the purchasers

parties to the suit. This not being done, the suit must be dismissed.

2. This is not an action of revendication, and consequently the property demanded, cannot be reclaimed.

3. The curatrix is not called on to account for the property of her deceased husband's succession, and no judgment can be rendered against her. In every point of view, therefore, in which it may be considered, this cause cannot be sustained.

Bullard, J., delivered the opinion of the court.

The only question presented in this case for our decision, is whether the petition sets forth any matters of probate jurisdiction.

The petition begins by alleging that he is a lawful heir of one Hyman, whose succession is open in the parish, and unadministered. That one of the defendants claiming to be the widow of the deceased, took possession of the estate, consisting of land, slaves and moveables, that it was sold by her without an observance of the provisions and formalities of law, and that the proceedings which have been had in the court to which the petition is addressed, are null, because no attorney of absent heirs was appointed, and no account of any administration was made and returned for several years after the opening of said succession. He then prays that the widow, who is said to have intermarried with the other defendant, and to one or both of whom, letters of curatorship have been granted, may be cited, &c., that he may be recognised to be a lawful heir of the deceased, that the sale of the said estate and all the proceedings had in this court, may be annulled, avoided and reversed, and the petitioner thereupon put in possession of said estate, or such portion thereof, as may be adjudged to him, and for general relief.

The Court of Probates will not entertain jurisdiction of a suit against a curator of an estate to recover the property which it is alleged has been irregularly sold, and especially when the purchasers are not made parties.

It is evident, the plaintiff's principal object is to recover the property of an estate irregularly sold, and it is clear the Court of Probates cannot inquire directly into the title to real estate, though there are cases in which it may be done incidentally, for certain purposes. It is alleged, that the property has been

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The Probate Court cannot inquire directly into the title to real estate, though there are cases in which it may be done incidentally.

It is not enough to allege that a defendant is curator of an estate, to give jurisdiction to the Court of Probates of the subject matter not in itself of probate jurisdiction.

sold, but to whom is not shown, nor is the supposed purchaser made a party. It is true, the plaintiff states that letters of curatorship have been granted to one or both of the defendants, but he does not ask that the letters of curatorship may be vacated, nor for an account of administration. It is not enough to allege that a defendant is curator to give jurisdiction to the Court of Probates of the subject matter not in itself of probate jurisdiction. The same remark may be made in relation to the allegation that the plaintiff is an heir, and the prayer that he may be recognised as such. The question of heirship may be inquired into, in any court of original jurisdiction, as a fact, on which the rights of the parties may depend. As an abstract question, it is no more of the exclusive competence of the Probate Court, than of any other. An heir, in order to sue for the property of an estate, which he claims in that character, is not obliged, first, to resort to a Court of Probates, to establish the fact of his heirship.

It has been attempted to show, that this is in fact, an action to annul judgments, orders and proceedings in the Probate Court, and consequently, that no other court could take cognizance of it. But the orders, judgments and proceedings, are not specified; on the contrary, it is alleged, that the estate is unadministered, and no authority to administer is asked. It is essential to an action in nullity of a judgment, that it should be brought against a person who was a party to the judgment. This is not alleged in this case. It is vaguely stated, that all the proceedings and orders are null, without showing that the defendants were parties, much less, that the plaintiff was. In this respect, this action has not the semblance of an action to annul a judgment. We infer from the whole tenor of the petition, taken together, that the allegation of nullity in the proceedings, was merely incidental to the principal demand, to wit: the recovery of property illegally alienated, belonging to the succession of Hyman, and that there is no question of probate jurisdiction stated, which the defendants had any interest in contesting. We are,

therefore of opinion, that the court, did not err, in sustaining the exception.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates be affirmed, with costs.

FLINT, SYNDIC, &c. *vs.* CUNY ET AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Where two judgments are rendered in the same case, and the last is appealed from, and decided to be a nullity, the right of appeal on the first judgment is suspended, until the decision takes place, and an appeal may be taken within a year from that period, although more than a year has elapsed, since signing the judgment appealed from.

This is an action instituted by the syndic, appointed by the creditors of the late Samuel C. Cuny, to rescind two sales of certain negroes and other property, first conveyed by S. C. Cuny, in his life-time, by notarial act, dated 24th May, 1824, to Stephen E. Cuny, and by the latter to R. R. Cuny, by act dated 17th May, 1826. The consideration expressed in both sales, was eight thousand one hundred dollars. See *the case reported in* 6 *La. Reports*, 67.

In his answer, Dr. R. R. Cuny, the last purchaser, avers the sale to him was for a *bonâ fide* consideration, that he would pay off a judgment of N. Cox, against his deceased brother, S. C. Cuny; that in pursuance of said agreement, he has paid N. Cox seven hundred and fifty-four dollars and seventy-six cents, and obligated himself to pay the balance of one thousand two hundred and three dollars and forty-seven cents, with interest and costs. He further states, "he

has never actually received into his possession, but a part of the property enumerated in said sale; and avers he is willing on his part, to re-convey *all the property that is in his possession*, by virtue of the said sale to him, to the petitioner, as syndic of the succession of Samuel C. Cuny, as soon as the said syndic shall pay him the sum of seven hundred and fifty-four dollars and seventy-six cents, with interest, &c., which he paid to N. Cox, and pay the further sum of one thousand two hundred and three dollars and forty-seven cents, with interest and costs as stated, for which he has become bound to said Cox, as a part of the consideration of said conveyance to him, by S. E. Cuny."

In an amended answer subsequently put in, Dr. Cuny pleads the prescription of one year against the action, as tending to rescind the sales; and avers, no injury was sustained by the creditors of S. C. Cuny, who are represented by the plaintiff, because they were not such at the time of the sale to him, and that they became creditors (if at all) since.

There were two appeals in this case. The first was tried, and sent back from the last judgment rendered. The second appeal was taken the 29th of October, 1833, from the first judgment rendered in the District Court, which was signed the 11th November, 1831. The Supreme Court decided, that the last judgment rendered by the district judge, was a nullity, and that the execution of the first judgment being suspended, until a decision was had on the last, the appellant's right of appeal was reserved accordingly. On the return of the case to the District Court, the present appeal was taken, although more than *a year* had elapsed, since the signing of the judgment appealed from.

Flint, for the plaintiff, insisted that this case must be dismissed, as the appeal was not taken, within a year from the date of the judgment appealed from.

2. The sales from S. C. to S. E. Cuny, and from the latter to Dr. Cuny, are simulated and void as to creditors, and must be set aside.

3. The syndic represents the creditors collectively, and is not restricted in his action, to set aside said sales, to a year from their passage, but only within a year from the date of his appointment.

Dunbar and Winn, for the defendants.

1. The delay in appealing, in this case, was occasioned by the act of the appellee, who notified the defendants to comply with the last judgment, instead of the first, there being two in the same case.

2. The Supreme Court, in deciding that the first judgment was the right one to appeal from, has reserved the right of appeal, and the limitation to appeal within a year, runs only from the date of the decision of the appellate court. See 6 *La. Reports*, 67.

3. The sales were made for a good consideration, to indemnify Dr. Cuny against a claim he became responsible for, on account of S. C. Cuny, to N. Cox. Even creditors cannot set them aside, as more than a year elapsed before suit.

Martin J., delivered the opinion of the court.

The facts of this case are correctly stated in the report of the decision of this court, when it was before us at the last term in October, 1833. See 6, *La. Reports*, 67. The judgment then appealed from, was reversed on the ground, that the District Court having already given a final judgment in the case, erred in re-considering that judgment, and rendering a second. The defendants are now appellants from the first judgment, and the appellees have prayed the dismissal of the appeal, on the ground that it was taken after the expiration of more than a year after the rendition of the judgment appealed from. This objection, it is contended, is fatal, as the appellant was of full age, and a resident of the state.

Where two judgments are rendered in the same case, and the last is appealed from, and decided to be a nullity, the right of appeal on the first judgment is suspended until the decision takes place; and an appeal may be taken within a year from that period, although more than a year has elapsed since signing the judgment appealed from.

This court is of opinion, the appeal was well taken, and in time. It appears by the proceedings of the District Court, after rendering and signing the judgment now appealed from,

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its execution was suspended, until the second judgment was set aside in the first appeal, as in case of an action of nullity.

On the merits, it appears the verdict of the jury is, that the sale of the defendants be cancelled, rescinded and set aside, and that R. R. Cuny, be re-imbursed, the sum of one thousand nine hundred and fifty-eight dollars, by him paid to N. Cox, and the costs of the suit, of said Cox, against him. The jury also find the slave Antoine, to be the property of the defendent, R. R. Cuny. On this verdict the court rendered judgment, cancelling and rescinding the sales, and that R. R. Cuny, recover from the plaintiff, as syndic for the creditors, the sum found by the jury to be due on account of the judgment debt of N. Cox. The latter part of this judgment is complained of. It is urged that the evident intention of the jury was, that R. R. Cuny, has the same right to the sum found, that the plaintiff has to the property, the sale of which is cancelled, and that he is not to receive the sum from the syndic as an ordinary creditor.

This court is of opinion that the objection ought to be sustained.

It is, therefore, ordered, adjudged and decreed, that the judgement of the District Court be annulled, avoided and reversed; and it is further ordered, adjudged and decreed, that the sale from S. C. Cuny to S. E. Cuny, and that from the latter to R. R. Cuny, complained of by the plaintiff, be cancelled and set aside, and that the plaintiff, recover from R. R. Cuny, all the property mentioned in the deed from S. E. Cuny to him, dated May 17th, 1826, filed in this cause, and marked D, together with all the increase of the slaves mentioned therein, on the plaintiffs paying to him the sum of nineteen hundred and fifty eight dollars, and the costs of the suits of N. Cox, against the said R. R. Cuny, in four months from the date of this judgment, and not otherwise; and that the said R. R. Cuny, retain the negro Antoine as his property, and that he be quieted in his possession, and title to said slave; and it is further ordered, adjudged and decreed, that the plaintiff shall not have execution on this judgment, nor otherwise disturb the defendant, R. R. Cuny, in the possession of the

property, the sale whereof, is herein conditionally cancelled, and rescinded, nor any part thereof, until he shall have paid to him the sums herein before stated; the costs of this present suit on the appeal, to be paid by the plaintiff and appellee, and the costs in the District Court by the defendants.

HALL *vs.* MULHOLLAN, EXECUTOR, &c.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

A bill of sale, executed in Kentucky, and valid under the laws of that state, which expresses the sale to be made, for a *valuable consideration*, without fixing any price, of certain slaves in Louisiana, will be tested by the laws of the place, where the contract was entered into; and being valid there, is good here, as between the parties, although not made in conformity to the laws of this state.

A contract, valid by the law of the place where it is made, as a general principle, is valid every where.

A chirographory creditor of a deceased vendor, whose estate he administers, as testamentary executor, has no right to withhold property or slaves found in the succession, from the vendee by a valid title, but which have not been delivered, without some right or lien, acquired in virtue of judicial process.

The executor derives his power from the will; is primarily the representative of the deceased, and not of the creditors of the succession, when it is not shown to be insolvent, and he is required to account to the heirs, and not to the creditors.

This is an action of revendication. The plaintiff sues to recover two slaves (Adam and Peter,) and two horses, which he alleges to belong to him, but now in the hands of the defendant, as executor of his deceased father, John Hall,

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and which the latter withholds from him, and is about to sell them, under an order of the Court of Probates. He further alleges, that he purchased the two slaves from his now deceased father, in Kentucky, for a valuable consideration, as will appear from a bill of sale, from his father to him, dated the 16th September, 1829, which he annexes to his petition. He states, that these slaves were included with five others, in the same bill of sale, but were in the state of Louisiana, at the time of the sale, and have remained here, as his father died soon after his return from Kentucky; that the defendant, as executor of his father's succession, claims said slaves as a part of it, which, with two horses, also belonging to him, the executor has placed in the inventory, and applied to the probate judge, to have sold. He prays for an injunction, to restrain the sale thereof, and that the executor be condemned to deliver to him, the two slaves and horses aforesaid.

The defendant pleaded a general denial; and that the bill of sale, under which the plaintiff claims the negroes in question, is not a valid instrument, to transfer the property in said slaves, by the laws of Louisiana; that there was no price paid, or consideration or sum specified, in said bill of sale, to be paid for said slaves, and no delivery took place; and that said instrument is equally defective, whether intended as a pledge for money paid or advanced, or as a sale, there being no delivery of the property. He further states, that the succession of Hall owes a large amount of debts, to creditors residing in Louisiana, without having sufficient property to pay the same, and it would be contrary to equity and law, to permit the plaintiff, who is one of the heirs of John Hall, deceased, to take any portion of the property of the succession from the state, &c.

The bill of sale produced in evidence, declares that John Hall, "for a valuable consideration, aliened, granted, bargained and sold, &c., unto Alfred J. Hall, of Scott county, in the state of Kentucky, the following negroes: *Peter*, *Adam*, &c., slaves for life, being the same negroes, mortgaged by me to M. Goddard, &c., to have and to hold said negroes, to him

the said Alfred J. Hall, subject to said mortgage, and his heirs forever; and I hereby warrant the title to said slaves, to him the said Alfred, against the claim of all persons whatsoever, save said mortgage," &c.

James F. Robinson, an attorney at law, in the state of Kentucky, in answer to interrogatories, states, "that he recognises this bill of sale, which was written by him, in the presence of the parties, and signed by J. Hall, who in unequivocal words, said it was a real and *bonâ fide* sale of the negroes named in it, with the professed object of both parties, of passing the titles to them. He further says, that by the laws of Kentucky, said bill of sale is legal and valid; and no other form is necessary there, to make a legal transfer of slaves; that the consideration specified, which is called a *valuable consideration*, is sufficient to constitute the bill of sale a legal one; and that by the laws of Kentucky, *love and affection* from parent to child, is a good consideration to sustain a contract, &c., between the parties and subsequent creditors," &c.; but that in this instrument, the terms "*valuable consideration*," were used to show, that it was not executed from love and affection, but that he saw the plaintiff pay on the mortgage to Goddard, five hundred dollars, part of a debt due by John Hall, deceased, which both of them stated, was a part of the consideration, which the plaintiff gave his father for said negroes. Witness understood from both, it was a purchase, and not a gift.

In November, 1829, two months after executing the bill of sale of said negroes, John Hall returned to his plantation in Louisiana, and died. In his will, he bequeathes the two slaves, Adam and Peter, the former to another son, John Hall, and Peter and his wife, to a free woman of color and her daughter. These two slaves were in Louisiana, at the time they were sold to the plaintiff, in Kentucky. The plaintiff made an attempt to carry them, and several other slaves, found in the succession of Hall, to Kentucky, but was pursued and overtaken by the defendant.

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The plaintiff had judgment for the two slaves; from which the executor, after an unsuccessful attempt to obtain a new trial, appealed.

Dunbar and Winn, for the plaintiff, contended, that the sale of John Hall to the plaintiff, was good, even if it had been made as a donation, being from father to son, and when the donor is not insolvent.

2. The bill of sale is genuine, and passes title in the slaves to the plaintiff, without delivery.

3. The sale is good, according to the laws of Louisiana; for being valid under the laws of Kentucky, where the contract was made, it is valid every where.

4. It is not necessary, that the term valuable consideration, should be expressed by a fixed sum of dollars and cents, to make a contract valid in Kentucky, where this sale was passed. It is sufficient, if it be for a good consideration, as the love and affection of a parent, &c. This consideration may be shown by testimonial proof.

Boyce, for the defendant, contended, that the executor found the property now claimed by the plaintiff, in the succession of the ancestor of the plaintiff, and was bound to administer it as such.

2. The plaintiff has no legal right or title to this property; for although the contract of sale under which he claims, might be valid in Kentucky, as a sale between the parties, according to the laws of *that state*, yet so far as it purports, to change the ownership of immoveable property, situated in Louisiana, it should have no effect *quoad this property*, because it would not be good if made here.

3. The general principle is admitted, as contended for, that "a contract, valid by the laws of the place where it is made, is valid every where." But the exception is also well founded, that contracts relating to immoveable property, within the jurisdictional limits of this state, no principle of comity or law, requires us to regard or enforce the law

of another state, when it is entirely different in its provisions, from our own.

4. Where personal or moveable property alone is concerned, the rule (it is admitted,) would be otherwise, both according to the common law, and our own system of jurisprudence. A contract for such objects, would be binding every where, if not contrary to good morals or positive law. This rule is well settled in England. See *case of Potter* vs. *Brown*, 3 *East's Reports*, 31.

5. According to *Huberus*, "a deceased person, with a family, whose property was in different provinces, the real property would descend according to the place where it was situated. But with respect to personal property, it would go according to the law of the place where the intestate lived, and of which he was an inhabitant." This court has recognised the same principle in the case of *Saul* vs. *his creditors*, 5 *Martin, N. S.* 590.

6. The rule then, is established in Saul's case, that where the personal statute of domicil, is in opposition to the real statute, where the property is situated, the real statute will prevail.

7. In this case, though the domicil of John Hall might be regarded as in Kentucky, for the purpose of this contract, and that it is to be governed by the laws of that state, as respects its validity, but it cannot operate on property in this state, peculiarly regulated by our laws.

8. To give effect to this contract, as proved by the testimony of the attorney at law, in Kentucky, would be giving effect to a sale of slaves in this state, by parole agreement, which is prohibited by our laws.

Bullard, J., delivered the opinion of the court.

The plaintiff sets up title to two slaves, under a conveyance from his father, the testator of the defendant, and procured from the District Court, an injunction, inhibiting the defendant as executor, from proceeding to sell them as belonging to the estate. The answer admits the execution of the bill of

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sale, which is exhibited as evidence of title, on the part of the plaintiff, but denies that it is a sale, in as much as no price is stipulated, and no delivery ever took place. The defendant further pleads, that the estate of Hall, is largely indebted in the State of Louisiana, and among others, to himself, who is the testamentary executor, and that there is not property enough in the state, to pay the debts due here, and the plaintiff as one of the heirs, cannot legally take out of the state, any part of the property belonging to the estate, while he has in his hands in Kentucky, a portion of it, greater in amount than any debt which the deceased owed him.

A bill of sale executed in Kentucky and valid under the laws of that state, which expresses the sale to be made for a valuable consideration, without fixing any price, of certain slaves in Louisiana, will be tested by the laws of the place where the contract was entered into; and being valid there, is good here, as between the parties, although not made in conformity to the laws of this state.

The instrument, purporting to be a sale of the slaves in question, was executed in Kentucky, while the slaves were in this state and remained until his death, in the possession of the testator. The first question which the case presents is, whether that instrument is evidence of a contract of sale. It is contended, that it is not because no price is fixed, and determined by the parties, on the authority of the case of *Conway* vs. *Bourdier et al.* 6 *La. Reports*, 346. Tested by our law, we should perhaps be compelled to say, that there is wanting an essential ingredient to constitute a sale, and that it could not avail as a donation, because not passed before a notary. But its essential character, as between the contracting parties, is to be ascertained by reference to the laws of the place where the contract was entered into; a contract valid by the law of the place where it is made, is valid every where. This is the general principle often recognised by this court and sanctioned by the highest authorities. 2 *Kent's Com.*, 264. The effect which is to be given to contracts made abroad in relation to our own citizens, is a distinct question. It is shown by evidence in the record, that according to the laws of Kentucky, this instrument would be a valid bill of sale between the parties, and the expression "for a valuable consideration," a sufficient enunciation of the price. We are, therefore, of opinion, that, as between the parties, it vested the title in the plaintiff.

A contract valid by the law of the place where it is made, as a general principle, is valid every where.

It is equally well settled, that the sale of slaves cannot have effect as relates to creditors before delivery. In this case no

A chirographory creditor of a deceased vendor whose estate he administers as testamentary executor, has no right to withhold property or slaves found in the succession, from the vendee by a valid title, but which have not been delivered, without some right or lien acquired in virtue of judicial process.

The executor derives his power from the will, is primarily the representative of the deceased, and not of the creditors of the succession when it is not shown to be insolvent, and he is required to account to the heirs and not to the creditors.

delivery is pretended, and the only remaining question is, whether the defendant, either in his own right as creditor, or in his character of executor, has a right to retain the slaves in question, and sell them to pay the debts of the estate. The defendant has shown that he is a creditor of the deceased. It is clear that the property would be liable to attachment or seizure, at the suit of creditors before delivery, but it does not appear to us to follow, that a creditor would be authorised to retain possession without some right or lien acquired in virtue of judicial process.

As testamentary executor, the defendant derives his authority from the will, and is primarily the representative of the testator. He does not, like a syndic, derive his power from the creditors of the testator, nor is it to them, that he renders his account. He gives no security, and it is to the heirs he is accountable for his administration. They can, at any time, deprive him even of the seizin given by the will, on offering him a sum sufficient to pay the legacies. *Louisiana Code*, 1664.

The plaintiff is, himself, one of the heirs, and the defendant is sued as executor. He alleges that the estate, so far as the property is situated in Louisiana, is insolvent, and that he has a right to retain the slaves in dispute, for the benefit of the creditors. We are not prepared to say, that if it were shown the estate is insolvent, the executor might not be considered, as so far representing the mass of the creditors, as to authorise him to resist the claim of the plaintiff. But he has not shown the insolvency of the estate. A tableau of distribution is exhibited, which has not yet been homologated, and the record does not show the amount of property. We are not to presume insolvency in a case of this kind, and until that is shown, although it may not yet be two late for any creditor to arrest the property in the hands of the executor, he is, in our opinion, without authority, either under the will, or in his own right to defeat the conveyance to the plaintiff, and to refuse delivery. Until he shows some legal claim, he must be regarded as merely representing the testator, and his contracts are binding on his heirs and legal representatives.

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It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

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APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Entering a formal appearance of a defendant in a civil suit, is unknown to the practice in Louisiana.

Filing a plea, exception or answer, is the only entry of appearance required. And in an application for the removal of a cause to the United States Court, filing the petition for such removal, is evidence of the defendant's appearance.

Where a defendant alleges the plaintiff is a citizen of a certain parish, *as appears by his petition*, which states he is a *resident: Held* to be sufficient allegation of citizenship.

Where a person swears, "*to the best of his knowledge and belief*," it is sufficient, and the addition of this qualification, does not detract from the strength of the oath.

When a proper case is made for the removal of a cause to the United States Court, by the defendant, no judgment by default is permitted, but the court is bound to order the removal *instanter*.

Exceptions or counter affidavits, are not allowed against a proper application of a defendant, for the removal of the suit against him to the United States Court.

No affidavit to disprove the allegation for the removal of a cause to the United States Court, will be admitted.

Officers of the army of the United States, stationed on duty in this state, do not cease to be citizens of the state in which they resided, and exercised the rights of citizenship, when called into service.

This is an action in which the plaintiff seeks to make the defendants liable for the value of a slave, which he charges

was killed by their orders, belonging to him, and worth the sum of fifteen hundred dollars.

He alleges that his slave, named Martin, was killed in the parish of Natchitoches, by three soldiers of the United States army, acting as a patrol, and belonging to Cantonment Jessup in said parish, acting nnder the orders of Gen. Henry Leavenworth and Captain Andrew Lewis, superior officers, commanding at said post. He charges that the slave was worth fifteen hundred dollars, and that he has sustained five hundred dollars in damages, for all of which, he prays judgment against the defendants *in solido*.

Gen. Leavenworth, on being cited, presented his petition, stating that he was a citizen of the state of New-York, and was impleaded in a suit with his co-defendant by the plaintiff, who is a citizen of Louisiana, in which the sum of fifteen hundred dollars is claimed; he, therefore, tenders security in the sum of three thousand dollars, and prays that this suit be removed to the District Court of the United States, sitting for the Western District of Louisiana, in Opelousas. An affidavit of the facts set forth, accompanied the petition.

Captain Lewis stated, that he was a citizen of the state of Massachusetts, and made a similar application with his co-defendant, to have this cause removed into the United States Court. In his affidavit, he swears that the facts set forth by him, *"according to the best of his knowledge and belief, are just and true," &c.*

After these applications were made, the plaintiff moved for judgment by default, which was disallowed by the court, on the ground that a judgment by default, cannot be claimed after the defendants had filed their petitions for removal of the cause; the plaintiff took his bill of exceptions to the refusal.

The plaintiff's counsel excepted to the filing of the petitions of removal of this case to the United States Court, before the defendants made an entry or appearance in court, in conformity with the 12th section of the act of congress of 1789, which were overruled on the ground, that no issue was required to be made up before removal, and the practice

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of this state did not require such appearance before answer or issue joined: a bill of exceptions was taken to the opinion of the court, overruling the exception. The opinion of the court, was also excepted to by the plaintiff's counsel, overruling his application to file counter affidavits, to disprove the facts alleged by the defendants, in their several applications.

The judge made the order of removal of the cause, as applied for. The plaintiff appealed.

Winn for the plaintiff, assigned the following points as errors, on the face of the record.

1. The district judge erred, in allowing the defendants to file their petitions of removal of the case, to the United States Court, before entering appearance in court, according to the act of congress of 1789.

2. The order of removal is erroneous, because the defendants did not make a legal showing, that the plaintiff *was* a citizen of Louisiana, and that they (defendants) were *not* citizens of Louisiana; and because one of the defendants in his affidavits, only swears to the *best of his knowledge and belief*, which is insufficient in law.

3. The decision of the District Court was erroneous in refusing a judgment by default, to the plaintiff.

4. The court erred in refusing to allow the plaintiff to show by counter affidavits, that the defendants were both citizens of Louisiana.

The defendants, by their own showing, are citizens of Louisiana, and are actually residing therein.

Boyce, contra.

Martin, J., delivered the opinion of the court.

The defendants in this case made several applications, filed several affidavits and surety bonds, and obtained several and separate orders for the removal of the present suit, to the District Court of the United States. The plaintiff took a separate appeal in each, and has filed a separate assignment of errors as follows:

1. The court erred in permitting the petition for a removal of the cause to be filed before, and without an appearance being entered.

2. The court erred in ordering the removal, as it was not legally shown, that the plaintiff is a citizen of Louisiana; and that *both* the defendants *are not;* and that each defendant did not allege his co-defendant was not a citizen of said state. That the affidavit of one of the defendants, is not absolute, but qualified, being *according to the best of his knowledge and belief.*

3. That the court erred in refusing leave to take judgment by default.

4. And finally in refusing leave to file exceptions and counter affidavits, and thereby show, that the defendants *were* citizens of Louisiana.

5. That one of the defendants, by admitting he was stationed in command of a military post, within the state of Louisiana, was from his own showing, a citizen of Louisiana.

Entering a formal appearance of a defendant in a civil suit, is unknown to the practice in Louisiana.

I. The entry of a formal appearance of a defendant, is unkown to the practice in Louisiana. The filing a plea or answer, or taking any notice in court, is the only evidence of such appearance which the record presents, or the law requires. In the present case, the filing of the petition for removal of the cause, was evidence of the defendants appearance.

Filing a plea, exception or answer, is the only entry of appearance required; and in an application for the removal of a cause to the U. S. Court, filing the petition for such removal, is evidence of the defendant's appearance.

II. Both petitions for the removal, were filed simultaneously. The petitioners allege, that the plaintiff is a citizen of Louisiana, and a resident of the parish of Natchitoches, as is alleged in his petition. It is contended, that this is not a positive and absolute, but a qualified allegation, and that the citizenship is presented, merely as a consequence of the alleged residence; that although the residence of a citizen of another state, renders him a *citizen* of the state in which he resides, the residence of an alien has not the same effect.

Where a defendant alleges the plaintiff is a citizen of a certain parish, *as appears by his petition*, which states he *is a resident: Held*, to be sufficient allegation of citizenship.

This court is of opinion, that the words, *as appears by the petition*, may well be taken as a reference to what actually appears in that document, that is to say, the residence in the

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parish, and not to what does not appear therein, viz: the citizenship.

The applications, though several, being simultaneous, and having the same object in view, may be considered as the joint application of both defendants, who may have been induced to make them in this way, because neither could aver and swear to the citizenship of the other, or they may have found it convenient to give security for both. Each swears to his own citizenship, and each may use the affidavit of his co-defendant, to satisfy the court of the citizenship of the other. A proper case being presented, the court might have made a single order of removal, and the case is not altered by two separate orders having been made.

Where a person swears "*to the best of his knowledge and belief*," it is sufficient, and the addition of this qualification does not detract from the strength of the oath.

Many have doubted, and this court has expressed its opinion, that it shared in the doubt, whether the addition in the affidavit, that the affiant swears *to the best of his knowledge and belief*, is not such a qualification of the oath, as may enable the party to avoid a conviction of perjury.

After the most mature consideration, our minds have come to the conclusion, that as the party swears to the *best of his knowledge*, he could not shelter himself under an allegation, that he swore according to his *belief* only. The oath, in fact, is not according to the best of his knowledge or belief. We, therefore, conclude, that the addition of this *formula*, detracts nothing from the strength of the oath.

When a proper case is made for the removal of a cause to the U. S. Court by the defendant, no judgment by default is permitted, but the court is bound to order the removal *instanter*.

III. When the defendant has made out a proper case for a removal, the State Court is bound to abstain from the further cognizance of the cause, and to order the removal of it *instanter*. It cannot, therefore, allow judgment to be taken by default.

Exceptions or counter affidavits are not allowed against a proper application of a defendant for the removal of the suit against him to the U. S. Court.

IV. Neither can the State Court act on, or receive exceptions or counter affidavits, in cases of this kind.

No affidavit to disprove the allegation for the removal of a cause to the U. S. Court will be admitted.

V. No attempt to disprove the allegations of the defendants, made in their affidavits, can be allowed. Applications for the removal of a cause, are to be disposed of in a summary way.

VI. The defendants have indeed shown, that, as officers of the army, in the service of the United States, they had been for a long time, in the performance of garrison duty, in one of

Officers of the army of the United States stationed on duty in this state, do not cease to be citizens of the state in which they resided and exercised the rights of citizenship when called into service.

the fortifications within the state of Louisiana. But this, in our opinion, does not deprive them of any right they may claim, as citizens of the state in which they resided, and exercised the rights of citizenship, when called out of it and ordered into the service of the United States. They cannot be deprived of such rights, without their consent. A voluntary residence in another state, than that in which one was a citizen, is evidence of an intention to abandon with the residence, the rights that result from it, when the removal is made in pursuit of the affairs or pleasure of the person concerned, but not when a citizen leaves his state, to serve the United States, out of the limits of his own state for a time.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

CHEW ET AL. *vs.* FLINT, CURATOR, &c.

APPEAL FROM THE COURT OF PROBATES FOR THE PARISH OF RAPIDES.

The person making opposition to an application for a curatorship of a vacant succession, must state in writing, the reasons why he claims the curatorship, in preference of him demanding it, and that he has a better right than the party claiming to be appointed; otherwise his opposition will be rejected, with costs.

A special agent or attorney in fact, of one or more creditors, cannot claim the curatorship of a vacant succession, over other creditors or strangers.

A transferee of claims against a succession, for collection, is but a mandatory, and if the transfer is simulated, that is, a mandate in disguise for the purpose of obtaining a curatorship, it cannot operate to the prejudice of *bonâ fide* creditors.

The law requires applications for curatorships of vacant successions, to be published in the gazette, as well as a notice at the door of the court house, and it is made the duty of the judge, to make these publications.

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Publication of applications for curatorships, is to operate as a constructive notice, to all persons having a right to make opposition, and as in all cases of constructive notice, it must be strictly proved.

An entry on the minutes of the Probate Court, stating the fact, that a publication of an application for a curatorship was made, is not evidence of the fact, as relates to persons to be affected by such notice.

The party, claiming the benefit of a publication of an application for a curatorship, is bound to show it was duly made.

This case is founded on two oppositions to the application of the defendant, to be appointed curator of the vacant successions of Jonas Meriam and J. W. Broaddus, merchants, lately trading under the firm of Meriam & Broaddus, in the town of Alexandria, and now deceased.

On the 4th of February, 1833, M. P. Flint, attorney at law, applied to the judge of probates, for the parish of Rapides, for the curatorship of the successions of Meriam & Broaddus, alleging that said firm, and each of its partners, was indebted to him in the sum of forty-one thousand seven hundred and fifty-nine dollars, with interest. He prays that he may be appointed curator to said successions.

On the same day, the probate judge made the following order: "Let this application be advertised, according to law; which petition was duly advertised, on the day of the filing thereof."

On the 13th February, Robert Chew, a resident of the parish of Rapides, and cashier of the branch of the Canal Bank, &c., in Alexandria, filed his opposition to the application of Flint, which he alleges, is based on claims against said successions, that are illegal and unjust, and which ought not to entitle him to the curatorship thereof; and he further alleges, he is the agent and representative of sundry creditors, to a very large amount, residing in New-Orleans and New-York, and of the Canal Bank, for two thousand dollars; wherefore he prays that Flint's application be rejected, and that he be appointed to the curatorship of said successions.

On the 13th March, 1833, following the above, Ezekiel Hayes filed his opposition to the application of Flint, on the ground that he was not a *bonâ fide* creditor of said successions; that he was not the owner of the debts he set up against them, but that said claims were transferred by persons having no rights, and which transfer to Flint was simulated, and without consideration, made to enable him to procure the curatorship of said successions. He alleges, he has the best right to the curatorship, his claim amounting to thirty-two thousand dollars. He prays, that he may be appointed, together with Robert Chew, the first applicant, and who represented his claim in that application.

Hayes further prays, that the application of Flint be rejected, and that he answer on oath, the following interrogatories:

1. Are you the *bonâ fide* owner of the claims against Meriam & Broaddus, on which your application is based?

2. Did you pay any consideration for them? if yea, how much?

3. From whom did you obtain the claims against Meriam & Broaddus, on which you base your application?

4. Were they not all obtained from Ivers Jewett? if not all, how many of them?

5. Did you obtain said claims by purchase, before the filing of your application? if not then, when?

6. Did you pay cash for them? or what did you give, and how much?

7. If you have not yet paid, what are you to give?

8. Do you not know, that Ivers Jewett was a partner of Jonas Meriam, or of Meriam & Rand, or of the late firm of Meriam & Broaddus?

9. Do you not know, that he has failed, and made an assignment of his property?

Hayes's opposition was overruled, as coming too late; to which order of the probate judge overruling the same, Hayes's counsel excepted.

Chew, in his opposition, propounded the same and foregoing interrogatories of Hayes, to which *Flint* answered on oath, as follows:

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1. He says he is the holder and owner of a claim, for the amount stated in his petition, against the succession of Meriam & Broaddus, for forty-one thousand seven hundred and fifty-nine dollars.

2. He says, that he gave his obligation, for the amount essentially negotiable, which was guarantied by his partner, Maj. Isaac Thomas, which said obligation has been transferred by Ivers Jewett, to whom it was given, and notice of transfer given to this respondent.

3. He says, that he obtained the claim on which he has based his obligation, from Ivers Jewett.

4. He says, that Ivers Jewett transferred to him, claims for the above specified amount, on the 4th day of February last.

5. He says, that he has already stated the manner, in which he obtained the claim, and refers to his previous statement for answer.

6. He says he did not pay cash for said claims.

7. He states that he paid on the obligation, that which he has already mentioned?

8. He states that he has already sufficiently answered this interrogatory, in his other answers.

9. He answers, that he does not know that Ivers Jewett has failed, but has heard that he had suffered much by the house of Meriam & Broaddus, and that he does not believe he has made any surrender of his property, in Massachusetts.

The counsel of Chew excepted to these answers, and object, that in his first answer, Flint does not reply to that part of the first interrogatory, which asks him, "if he is the *bonâ fide* owner of the claim." To the fifth, he does not reply fully to that part, in which he is asked, "if he purchased the claim." To the eighth, because he does not answer fully that part, which asks him, "if he is to pay cash, and how much." The exception was overruled, and a bill of exceptions taken.

The claim on which Flint bases his application, is an account current of Messrs. Meriam & Broaddus, with Ivers Jewett, beginning in November, 1831, and ending February 1st, 1833, on which day a balance was struck, in favor of

Jewett, amounting to forty-one thousand seven hundred and fifty-nine dollars and twenty-six cents.

At the foot of the account current, is the following assignment:

"For value received, I hereby assign, transfer and set over to M. P. Flint, the balance due me on the above account, against the firm of Meriam & Broaddus, said balance being forty-one thousand seven hundred and fifty-nine dollars and twenty-six cents."

"February, 4th, 1833." "Ivers Jewett."

The testimony shows, that Meriam died in New-York, about the last of October, 1832, and Broaddus on the 2d of February, 1833, at his residence in Alexandria, Louisiana.

There is no evidence in the record, that the application of Flint was ever advertised, except the statement from the minutes of the court, that the "petition was duly advertised, on the day of the filing thereof."

After hearing all the evidence concurrently, with the opposition of Robert Chew, the probate judge decreed, that Micah P. Flint be appointed the curator of the vacant successions of Jonas Meriam and J. W. Broaddus, deceased, on giving bond with security, according to law; and that Boyce and Barry be appointed attorneys, to represent the absent heirs; and that Chew pay the costs of his opposition, the said successions paying the balance.

Chew and Hayes filed a motion for a new trial. 1. The judgment is contrary to law and the evidence. 2. Hayes, a principal creditor, moves specially, that his application ought to have been received as in time, and that he should have been appointed. This motion was overruled. Chew and Hayes both appealed.

Dunbar, Thomas and Flint, in support of the appointment of the curator.

1. In contestations for curatorships of vacant estates, it must be granted to the creditors, in preference to those who are not. The judge is bound to exercise his discretion, in

choosing between creditors, and to give a preference to the larger. *La. Code*, 1119.

2. A creditor living at the place, or in the state, should be preferred to one who resides at a distant place, or out of the state. 4 *Martin*, 373, 374.

3. Oppositions to appointments, can only be founded on a better right, than the person claiming the curatorship, and must be made within ten days after the application is advertised. The record declares, Flint's application was duly advertised; and Hayes was therefore properly rejected. *La. Code*, 1111. *Code of Practice*, 970, 972.

4. The curator should be a resident of the parish, where the succession is opened. In this respect, Flint must be preferred, and his appointment maintained. *La. Code*, 444, 445, *and* 1149. See *case of Rust* vs. *Randolph*, 4 *Martin*, 373.

5. Chew, one of the appellants, was not a creditor, but only the attorney in fact, or agent of creditors; he had therefore no personal interest in the succession, and is not authorised to vote for, or be appointed curator, for it is only for the appointment of syndic, that an attorney in fact can vote.

6. The transfer of Jewett's claim to Flint, was after the succession was opened, but previous to the application for the curatorship and judgment thereon, which latter period is to be looked to, in pronouncing on contestations between creditors, on their respective claims. 5 *Martin*, 89.

7. There is no weight in the objection of the counsel for the appellants, that Flint was the purchaser of a litigious right, and therefore not entitled to the curatorship. A right is not litigious, because it is required to be settled by law, in a court of justice. On this principle, every right or claim might be said to be litigious, because it is liable to be collected or settled by a law-suit.

Winn, Boyce and Barry, for the oppositions of Chew and Hayes, to the appointment of the curator, contended:

1. That in all contestations of curatorships of vacant successions, the creditors of the deceased, at the opening

of the succession, are entitled to the preference, over those who become such afterwards. *La. Code*, 1114.

2. Although Chew is not a creditor, he is the attorney in fact of creditors, to a large amount, and is authorised to represent them as fully in this case, as if they were present; in this he is *pro hac vice* a creditor, and entitled to the curatorship.

3. Heirs may accept and administer a succession, by an attorney in fact, and the same reasoning and analogy applies with greater force to creditors. *La. Code*, 1038, 1042, 2966.

4. The application of Flint to be curator, was never in fact advertised, and his appointment is therefore null and void, on this ground. The mere endorsement on the petition, and statement in the record, that it was advertised according to law, is no evidence that it was so advertised. The advertisement must be shown by legal proof. *Code of Practice*, 967–8. *La. Code*, 1109.

5. The claims of Flint were purchased by him, as litigious rights against this succession, and therefore do not entitle him to the curatorship. *La. Code*, 2523, 3622, *No.* 22.

Bullard, J., delivered the opinion of the court.

The controversy in this case, grows out of sundry oppositions to the appointment of the appellee, to the curatorship of the estates of Meriam & Broaddus. Only two of these oppositions are to be considered by this court, to wit: that of R. Chew, in his own right, and as the attorney in fact of numerous creditors, in New-Orleans, and of E. Hayes, who alleges himself to be a creditor. Separate appeals were taken, and prosecuted by these two parties, and have been argued together. The opposition of Chew was overruled, and that of Hayes not received by the court below, on the ground that it was not filed within the ten days limited by law. Two questions, therefore, present themselves: 1st. Did the court err in overruling the opposition of Chew, upon the merits? and, 2d. Was the opposition of Hayes in time, and based upon such grounds, as authorised him to make opposition?

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The person making opposition to an application for a curatorship of a vacant succession, must state in writing the reasons why he claims the curatorship in preference of him demanding it, and that he has a better right than the party claiming to be appointed, otherwise his opposition will be rejected with costs.

A preliminary inquiry presents itself, to wit: who has a right to make opposition to the appointment of an applicant for the curatorship of a vacant estate. The 1112th article of the Louisiana Code, requires that the opposition should be in writing, stating the reasons why the party opposing, claims the curatorship in preference to the party demanding it. In that part of the Code of Practice, which treats of the appointment of curators of vacant successions, and to absent heirs, the legislature is still more explicit. Article 972 declares that, "this opposition can only be founded on the allegation of a better right on the part of the person opposing, than of the person claiming the tutorship (in the French text *Curatelle*), otherwise it shall be rejected with costs," &c.

The opposition of Chew, which was tried on the merits, and which we are called on to review, was founded on the twofold grounds, that he was a creditor, and that he was the special agent of sundry other creditors in New-Orleans. One of those grounds has been explicitly abandoned in the argument, and it is not now contended, that he is a creditor in his own right. We are, therefore, to regard his claim, only as the special agent of others, who are shown to be creditors.

Several powers of attorney are spread upon the record, all of similar import, signed by various creditors, authorising the appellant, R. Chew, to apply for the appointment of a curator, to the proper tribunal, and further authorising him, in their behalf, to have the said R. Chew, appointed said Curator.

The inquiry, therefore, as relates to Chew, is narrowed down to this: whether a special attorney, in fact, who is authorised to apply for the curatorship, in his own name, shows a better right than the appellant.

A special agent or attorney in fact of one or more creditors, cannot claim the curatorship of a vacant succession over other creditors or strangers.

The Code establishes the order of preference, article 1114. 1st. The surviving partner, unless the partnership has been a commercial one. 2d. The heir present or represented in preference to the surviving husband or wife. 3d. The surviving husband or wife, in preference to the creditors of the deceased; and, 4th. The creditors in preference to those who are not. This part of the Code, does not give expressly to an attorney in fact of creditors, any preference, either over

other creditors or strangers, to the curatorship. Upon his appointment, he would necessarily cease to act as the attorney in fact of particular creditors, because he would be bound to give security, and take an oath, and would be bound to administer for the interest of all the creditors, and not specially for that of his constituents. His authority to apply in his own name for the curatorship, in their behalf, would cease on his appointment, for it is clear, they cannot authorise him to administer for their benefit. Admitting that any one of his principals had a better right than the appellee, it does not follow, that their joint procuration confers a legal right on their attorney in fact, however respectable it may be, as a recommendation to the judge of the Court of Probates.

But it is urged, that, in the administration of estates, a beneficiary heir, who is absent, may administer by a special agent, or attorney in fact, and that *ube eadam est ratio eadam est lex.* The Louisiana Code, article 1038, which is relied on by the counsel for the appellants, provides that, "if the beneficiary heirs are absent, but represented in the state, their attorneys in fact can claim, in the name of their constituents, the preference for the administration over every creditor of the succession, provided they have a special power to accept or reject this succession, or a general power to accept or reject all successions, which may fall to their principals."

This part of the Code, regulates the administration of successions accepted with the benefit of an inventory, and gives to the heir at law, the preference over all others in the administration. He administers, not for the exclusive interest of creditors, but has, in his own right, the residuary interest in the estate. The Code, therefore, even in cases of his absence, does not exclude him; but his attorney in fact is authorised to demand the administration in his name, on furnishing the necessary security. In the administration of vacant successions, a different principle is established: the eventual and residuary rights of the heirs, who are absent and unknown, are to be protected by a counsel of absent heirs, whom it is the duty of the court to appoint, and whose functions do not expire until the heirs make their appearance, or until the

curator is finally discharged. He is required to represent the absent heirs, not only in the inventory, but in all the acts required by law to be done. We do not think ourselves authorised to extend the provision of the Code relied on, to cases not expressly embraced by it, and particularly to a case, where the distinction is so obvious.

The opposition of E. Hayes, which we are next to consider, was founded on the allegation, that he is the largest creditor of the succession, that the other applicants, except Chew, are unfounded in their pretensions, that they are not *bonâ fide* creditors of said succession, and that if they present any claims, which are entitled to be considered debts, they are not the owners of them: that the same have been transferred by persons, who had no right to transfer them, and in addition to this, the transfers are simulated and without consideration, to enable the applicant M. P. Flint, to obtain the curatorship of the estate.

A transferee of claims against a succession for collection, is but a mandatory, and if the transfer is simulated, that is a mandate in disguise for the purpose of obtaining a curatorship, it cannot operate to the prejudice of *bonâ fide* creditors.

This opposition is based upon a better right, than that of the applicant, if it be true, that Hayes is a real creditor, and Flint only a fictitious one; for we cannot doubt, (without inquiring at this time, into the question much discussed in the argument, whether the transferee of a debt be a creditor of *the deceased*, as contradistinguished from a creditor *of the estate*,) but that the law intended to confer the curatorship on a real *bonâ fide* creditor, in preference to one who is only nominally so, and who acts merely as a person interposed. If the application of Hayes, did not come too late, our opinion is, that it shows on the face of it, a case which, if the facts are taken as true, would entitle him to the preference, if he possesses, in other respects, the necessary legal qualifications. A transfer merely for the purpose of collection, is but a mandate, and if the transfer in this case be simulated, that is, a mandate in disguise, for the purpose, as it is alleged, of obtaining the curatorship, it cannot operate to the prejudice of *bonâ fide* creditors, in their own right, who have really something to gain or lose by the admission or rejection of their claims. As a mere mandatory, we have already said, he can have no legal preference, and if he be not in truth and

in fact the owner, although nominally so, he is not a creditor in relation to other creditors, in a contest for the curatorship.

But the judge below rejected or refused to receive the opposition, on the ground, that it came too late; that more than ten days had elapsed since the publication of the notice of application by Flint, after which the Code forbids any opposition to be made. The only evidence of the notice having been published and advertised, appears in the record, to be endorsed beneath the order of the judge, in these words, "which petition was duly advertised, on the day of the filing thereof." This is extracted from the minutes of the court.

The law requires applications for curatorships of vacant successions, to be published in the gazette, as well as a notice at the door of the court house, and it is made the duty of the judge to make these publications.

The Code requires a publication in the gazette, as well as a notice at the door of the court house, and it is made the duty of the judge to make these publications. *C. P.* 968, 969.

Publication of applications for curatorships is to operate as a constructive notice to all persons having a right to make opposition, and as in all cases of constructive notice, it must be strictly proved.

The publication thus provided for, is to operate as a constructive notice to all persons, having a right to make opposition, and as in all cases of constructive notice, it must be strictly proved. It is true, it is the duty of the judge to give notice, but it does not, in our opinion follow, that an entry in the minutes of the court, stating the fact, is evidence of the fact, as relates to persons to be affected by such notice, and is to conclude them. The party who claims the advantage of such notice, is bound, in our opinion, to show it. In this case, it was not shown, by sufficient legal evidence, and we think the court erred in refusing to receive the opposition.

An entry on the minutes of the Probate Court stating the fact, that a publication of an application for a curatorship was made, is not evidence of the fact as relates to persons to be affected by such notice.

The court cannot forbear to add, that the scramble too common in our courts, in which gentlemen of the bar are interested, in relation to the administration of estates, the struggles *per fas et per nefas*, which mark these contests; the protracted delays which attend them, regardless of the rights of honest, and it may be of suffering creditors, are calculated to defeat the ends of justice, and reflect no credit on the profession.

The party claiming the benefit of a publication of an application for a curatorship, is bound to show it was duly made.

It is, therefore, ordered, adjudged and decreed, that the judgment of the Court of Probates, be annulled, avoided and reversed; that the case be remanded, with instructions to the

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judge, not to refuse to receive, and act upon the opposition of E. Hayes, unless the appellee shows the publication of the notice according to law, and that so far as it overruled the opposition of Chew, the judgment of the Court of Probates be affirmed, with costs in both courts. The costs of the appeal, as to E. Hayes, to be paid by the appellee.

WILLIAMS *vs.* KELSO.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

The writ of execution must pursue the judgment. But if the judgment be in itself vague and uncertain, it may be rendered certain by reference to the pleadings.

When a writ of possession is directed to a sheriff, a copy of the judgment, and a copy of the petition to which it refers, must accompany the writ, in order that the officer may not be mistaken in the premises, of which he is to give possession.

So in a possessory action, when the premises in contest are so vaguely described in the pleadings, that they cannot be designated with any certainty, and the verdict and judgment are general, "that the plaintiff recover possession of *the land sued for*," they will be set aside as being too vague, and the cause remanded for a new trial.

This is a possessory action, in which the plaintiff alleges, he is owner of a tract of land, of ten arpents front, by the usual depth, on Bayou Robert, and that he has been in the quiet possession of it, for more than a year, and in the actual occupation and cultivation of the same, until recently, the defendant invaded his premises, and forcibly and violently took possession of *a part of said tract*, without any legal authority.

He alleges, he has sustained five hundred dollars damages, for which he prays judgment, and that he be restored to the possession of such part of his tract, as has been taken into possession by the defendant, and his costs.

The defendant pleaded a general denial. He denies specially that he ever dispossessed the plaintiff of any part of his land; and avers, he is the actual owner and possessor of the land claimed, and has been in the possession thereof for many years; possession of a part being possession of the whole. He prays to be dismissed with his costs.

Upon these pleadings, the parties went to trial. Many witnesses were called, and testified on both sides, whose testimony was taken down in writing. But none of the testimony designated the precise amount or quantity of land, the possession of which was in contest. No diagram or survey of the disputed premises, was made. The cause was submitted to a jury, who found a general verdict for the plaintiff, and six and one-fourth cents in damages. Judgment was rendered on the verdict, "that the plaintiff recover the land sued for," and that he be quieted in the possession thereof, and recover six and one-fourth cents damages, and costs. The defendant appealed.

Dunbar, for the plaintiff, explained the case, and insisted the verdict and judgment must stand, and that the plaintiff shall be put in possession of the contested premises.

2. The evidence shows, that the plaintiff was in possession, more than a year preceding the disturbance, and that the defendant pulled down his fences, and took forcible possession of the disputed premises.

Barry, for the defendant, contended, that the judgment in the case was entirely indefinite, and decided nothing between the parties. The case must therefore be remanded for a new trial.

2. On the merits of the case, the defendant is entitled to judgment, quieting him in the possession of the land, as he claims it.

Boyce, on the same side, went into an argument, to show the true nature of possessory actions, and the principles upon which they rest. In this case he insisted, the judgment was so vague and uncertain, that it would be impossible for the sheriff to execute it, by putting the party in possession.

2. The officer could not execute a writ of possession, without becoming the arbiter between the parties, which would lead to new disturbances, and end in additional law-suits.

3. The pleadings are so loose and vague, and the evidence, as taken down by the clerk, so confused and uncertain, as to afford no guide for the execution of the judgment.

4. In our system of jurisprudence, as well as by the common law, when the pleadings are loose and indefinite, so much so as to leave the matter in contest uncertain, the verdict and judgment cannot stand. *Bacon's Ab. verbo verdict.*

Thomas and Winn, for the plaintiff, in conclusion.

Bullard J., delivered the opinion of the court.

This is a possessory action, in which judgment being rendered on a verdict against the defendant, he appealed. The appellant relies, principally for a reversal of the judgment, on the ground, that both the petition and judgment are so vague and uncertain, that no writ of possession can be issued and enforced, without leaving to the clerk and the sheriff, a discretion not given them by law.

The petition sets forth that the plaintiff has been in quiet possession as owner, for more than one year, of a tract of land, containing *about* four hundred and thirty-five arpents, having a front of about ten arpents on the Bayou Robert, it being the same formerly owned by Job Ruth. He states, that his possession of *a part* of the premises, within his clearing and actual cultivation, has been recently invaded by the defendant. He prays that he may be restored to his possession of so much of said premises as were in his possession, and has been forcibly taken by the defendant. The verdict was

a general one in favor of the plaintiff, and assessed his damages at six and a fourth cents; and the judgment pronounced thereon, was, "that the plaintiff have judgment against the defendant, for the possession of the land sued for, and that he be restored to, and quieted in the possession thereof."

The contest appears to have related to a very small part of the land possessed by the plaintiff, so trifling indeed in extent, that without being cumulated with a demand for damages, it could hardly form the object of an appeal to this court.

The general rule, that the writ of execution must pursue the judgment, will not be disputed. If the judgment be in itself, vague and uncertain, it may be rendered certain, by reference to the pleadings. 3 *Martin, N. S.* 7. In a case like this, the Code of Practice provides, articles 630 and 631, that the writ of possession shall be directed to the sheriff, with a copy of the judgment, and even a copy of the petition to which it refers, to the end that the sheriff may not be mistaken concerning the nature of the estate and appurtenances, of which he is to give possession. The law, therefore, requires, at least a reasonable certainty, and never intended that the rights of parties after a judgment pronounced, should depend, at least, upon the discretion of the sheriff. Suppose in this case, the writ to issue, with a copy of the petition and a copy of the judgment. The sheriff, it appears to us would be greatly at a loss how to proceed. He would be compelled to apply for information to some body. Is he to summon witnesses, or address himself to the parties? In either case, the cause is to be tried over again by the officer sent to execute the judgment of the court.

To this, it is answered, that the defendant ought to have excepted to the petition, as too vague and uncertain, and that he is precluded by the judgment, and that he has no right to complain that the judgment cannot be executed for uncertainty. That he might have declined answering to the merits, until the cause of action was more explicitly set forth, may be true, but it does not, in our opinion, follow, that, when that uncertainty is not cured, either by the verdict or the judgment, he is bound to submit without objection. Parties

The writ of execution must pursue the judgment; but if the judgment be in itself vague and uncertain, it may be rendered certain by reference to the pleadings.

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So in a possessory action, when the premises in contest are so vaguely described in the pleadings that they cannot be designated with any certainty, and the verdict and judgment are general that "the plaintiff recover possession of *the land sued for*," they will be set aside as being too vague, and the cause remanded for a new trial.

have a right to require their rights to be adjudicated upon in such a manner, as that the judgment rendered, may be a bar to a future action for the same thing, and, as will not necessarily expose them to the exercise of an arbitrary discretion on the part of the officer charged with execution.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court, be annulled and reversed, the verdict set aside, and the cause remanded for a new trial, and that the appellee pay the costs of the appeal.

THOMAS *vs.* BAILLO.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE PARISH JUDGE OF THE PARISH OF RAPIDES PRESIDING.

Where a motion was made to dismiss the suit, because a copy of the petition was not served on the defendant in the French language, his vernacular tongue, the plaintiff was permitted at the same time to *amend*, by filing a copy of the petition in the French language, and having it served on the defendant.

The Code of Practice does not pronounce the absolute nullity of a petition or pleadings, defective *in form* only; the nullity is relative, and the party has a right to amend his pleadings.

In a possessory action, where the defendant alleges in his answer, that he purchased the disputed premises from the government, and assumes to call on the government to warrant his possession, the court will disregard this part of the answer, and all the evidence that goes to establish or invalidate titles on both sides.

The strict and legal inquiry in a possessory action is, "was the plaintiff the actual possessor, as alleged by him, and did the defendant disturb him and take possession."

The court is forbidden to give any weight to evidence in a record, which is foreign to the question at issue.

In a possessory action, when the judgment describes the contested premises with sufficient accuracy, to enable the sheriff to execute a writ of possession, accompanied with a copy of the judgment, without exercising a dangerous discretion, the judgment will not be disturbed.

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This is a possessory action. The plaintiff alleges, he was in the peaceable possession of a tract of deadened and cultivated land, in the parish of Rapides, situated on both sides of the bayou Toro, more than three years before instituting this suit, when in February, 1832, the defendant, by forcible entry and detainer, ousted him of his possession, by which he has sustained damages, to the amount of three thousand dollars. He prays judgment for his damages, and to be restored to the quiet possession and enjoyment of the premises, and that the defendant be enjoined from any further disturbance.

The defendant pleaded a general denial; and that he had been about four years, in the peaceable possession of a tract of seven hundred acres of land, embracing the part now in contest, which he purchased from the government of the United States, and had a right to call the latter in warranty, and connect its possession with his own, which he does, and prays to be quieted in the possession of the whole of said tract of land.

The defendant's counsel moved to dismiss the suit, on the ground, that a copy of the petition was served on the defendant in English, when the French language was his vernacular tongue. The plaintiff, at the same time, moved to file an amended petition, and have a copy of the petition in the French language served on the defendant. The motion to dismiss was overruled, and the plaintiff's motion to amend his petition sustained, and a bill of exceptions taken by the plaintiff's counsel, to the opinion of the court.

The parties went to trial on these pleadings and issues.

M'Crummen (parish surveyor), a witness sworn for plaintiff, says he surveyed the land in controversy, in 1828, by instruc-

tions from the United States government, for the plaintiff, which was included in a tract of forty arpents front on both sides of Bayou Toro. Plaintiff asked witness, if he did not survey this land for him as claimant, under the confirmation of the United States government; to which witness replied in the affirmative, (excepted to.) Plaintiff being the claimant to the land under confirmation from government, witness was instructed to require of him the payment of the surveyor's fees, which were paid accordingly.

Blundell, one of the chain carriers, testified, that the surveyor laid off the tract of forty arpents front on both sides of bayou Toro, which included all the cleared and deadened land, &c.

M'Crummen, cross-examined, says, in 1830 or 1831, at the request of the defendant, he traced out sectional lines, partly within the limits of the survey made for the plaintiff, as above stated, which land defendant claimed, under a purchase from the United States government, (excepted to.)

Gillard, witness for defendant, says, he entered the land in controversy, for the defendant, in the land office, the 27th December, 1830. Defendant took possession of the land, in February, 1831, and in April following, placed some hands on it, to deaden timber, &c.

Several other witnesses were called, and examined on both sides, touching the possession, and the part of which the plaintiff complains he was dispossessed.

The parish judge, who presided in the place of the district judge, who recused himself, gave judgment, restoring the plaintiff to the possession of the land claimed by him; designating his boundary and limits, and quieting him in the possession thereof; and decreed him the sum of one hundred and twenty dollars, in damages with costs. The defendant appealed.

This case was argued by *Mr. Thomas, in propriâ personâ*, on the part of the plaintiff, and by *Mr. Winn*, for the defendant.

Where a motion was made to dismiss the suit, because a copy of the petition was not served on the defendant in the French language, his vernacular tongue, the plaintiff was permitted at the same time to *amend* by filing a copy of the petition in the French language and having it served on the defendant.

Bullard, J., delivered the opinion of the court.

The first question presented in this case, for our solution, is whether the court erred in refusing to dismiss the petition, on the motion of the defendant, on the ground, that the French language was the vernacular tongue of the defendant, and the petition should have been served in that language; and in allowing the plaintiff to amend, by filing a copy in French, and having a citation in that language served. It appears from a bill of exceptions in the record, that the defendants counsel moved the court orally, (the making of which motion orally, was expressly agreed to by the plaintiff) to dismiss the suit on the ground the French language is the vernacular tongue of the defendant, which fact was admitted, and that, thereupon, the plaintiff moved for leave to amend by filing a copy of the petition in French, and to have a citation served in that language.

This motion, we suppose, is to be considered as an exception, and it is contended by the defendant, that it is a peremptory one, which precluded any amendment, and which could only be followed by a dismissal of the suit. The article 172 of the Code of Practice enacts, "that the petition when either party speaks the French language, as a mother tongue, must be drawn in the French and English languages." The same expression, "*must be*," is applied to all the required forms and particulars of a petition, such as the names, surnames and places of residence of the parties. But the Code does not pronounce the absolute nullity of a petition defective in these particulars. The nullity is, therefore, only relative, and the defendant has undoubtedly a right to require the petition and citation, to be in both languages, on showing that his native language is French," but it does not necessarily follow, *that the* suit must be dismissed. The Code authorises amendments, even after issue joined, under certain restrictions, for the ends of justice; and it does not appear to us the court erred in this case, in allowing the amendment, and ordering a further service to be made on him. If the action had become prescribed before the second service, it would present a serious question, which service would be con-

The Code of Practice does not pronounce the obsolute nullity of a petition or pleadings defective *in form* only; the nullity is relative, and the party has a right to amend his pleadings.

sidered as interrupting the prescription. That question does not arise in this case, because a year had not elapsed between the act complained of in the petition, and the date of the second service; and an answer was filed at the subsequent term, in which prescription of the action is not pleaded. In relation to an exception, founded on a defect in the petition, analogous to this, we held that the amendment was properly allowed. 6 *La. Reports*, 380.

The petition sets forth, that the defendant had dispossessed the plaintiff of a tract of deadened and cultivated land, on both sides of the Toro, in the parish of Rapides, which he had possessed quietly and uninterruptedly, for more than three years, and he prays to be restored to the possession of the premises, with damages.

The defendant in his answer, denies all the facts and allegations relied on by the plaintiff, and further alleges, that he has been, for about four years, in the peaceable, uninterrupted and continued possession, of about seven hundred acres of land, which he derived from the government, by purchase, "and he has the right to call the government in warranty, and to connect the possession of the government with his own, which he does; he prays judgment against the plaintiff, and that he may be quieted in his possession of the whole of the land, purchased from the government," &c.

The action is strictly possessory, and in relation to questions of title and the nature of the evidence to be admitted, we are governed by the positive enactments of the Code of Practice.

"The plaintiff in a possessory action, needs only, in order to make out his case, to prove that he was in possession of the property in question, in the manner required by this Code, and that he has been either disturbed or evicted, within the year previous to his suit. So that when the possession of the plaintiff, or the act of disturbing him is denied, no testimony shall be admitted, except as to the fact of the possession, or as to the act of disturbance, and all testimony relative to property shall be rejected." *Code of Practice, article* 53.

"When the possession of the plaintiff is accompanied with all these circumstances, it matters not whether he possesses

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In a possessory action, where the defendant alleges in his answer that he purchased the disputed premises from the government, and assumes to call on the government to warrant his possession, the court will disregard this part of the answer, and all the evidence that goes to establish or invalidate titles on both sides.

The strict and legal inquiry in a possessory action is, "was the plaintiff the actual possessor as alleged by him, and did the defendant disturb him and take possession?"

The court is forbidden to give any weight to evidence in a record which is foreign to the question at issue.

in good or in bad faith, or even as an usurper, he shall nevertheless be entitled to his possessory action." *Code of Practice, article* 49.

The circumstances here referred to, are that he should have been in the real and actual possession at the instant when the disturbance occurred, that he should have had that possession for more than a year, with one or two exceptions; that he should have suffered a real disturbance either in fact or law, and that he should have brought his suit at least within the year.

With principles so clearly announced as our guide, we cannot be mistaken in saying, that we are bound to disregard, altogether, that part of the answer which alleges a purchase from government, and assumes to call on the government to warrant the possession of the defendant, and all that evidence which goes to establish, or to invalidate titles on both sides, and to confine ourselves to the single inquiry, was the plaintiff the actual possessor, as alleged by him, and did the defendant disturb him and take possession?

The cause was tried in the court below, without the intervention of a jury, and as all the evidence is in the record, it is not necessary to notice any further, the bills of exceptions. We are forbidden to give any weight to that which is foreign to the question at issue. The court gave judgment in favor of the plaintiff, and the defendant appealed.

The facts that Pamplin had possessed an enclosed field, for several years, as the tenant of the plaintiff, and cultivated it; that on the first of January, 1832, it was leased to Glenn, who took possession, and began to work on it; that in the temporary absence of his hands, the defendant came with, or sent his hands, and took possession, went on to cultivate it, and still retains possession, are abundantly proved. That adjoining this field, a large deadening had been made by the plaintiff, which was nearly fit for cultivation, was shown to the satisfaction of the court below. The extent of the premises thus possessed, is shown by the evidence. The enclosed land produced in 1831, about thirty bales of cotton. The possession of other lands in the neighborhood, on the part of

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the defendant, which, for aught that appears, the plaintiff had no interest in contesting, and the numerous records of suits in the record, in relation to other lands, are foreign to this inquiry. On a careful examination of the evidence, we are not enabled to say, that the court erred in its conclusion.

But it is contended that the judgment is so vague and uncertain, that it cannot be executed. On referring to the judgment, we find that the premises are minutely described, so as to enable the sheriff to execute a writ of possession, accompanied with a copy of the judgment, without exercising a dangerous discretion. We have had occasion to examine that subject at the present term, in the case of *Williams* vs. *Kelso*, *ante* 406, and we refer to the opinion in that case, for the view of the court upon that question.

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be affirmed, with costs.

The defendant being dissatisfied with the decision and judgment of the court, presented a petition for rehearing. On considering and examining the petition, the court made the following modification of its judgment:

Bullard, J.

In this case a rehearing has been prayed for, and a minute examination of the evidence in the record, leaves a doubt in our minds, whether the building of a cabin within the deadened land, in 1831, amounted to a disturbance of the plaintiff, and if so, how far the actual possession of the defendant extended, before February, 1832, at the time he took possession of the enclosed land.

On this point, a rehearing is granted.

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APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE THEREOF PRESIDING.

Redhibitory defects or vices which are made known, by the vendor to the vendee, at or before the sale, cannot be urged in avoidance, or in any manner set up against the sale.

Parole evidence is admissible, to prove the declarations of a vendor, in relation to the redhibitory vices of slaves, at or before the sale.

The mere legal agent, appointed to sell property, by authority of law, has no powers but those conferred by law.

It is the duty of auctioneers, to receive the conditions of sale in writing, from the vendor, and to read and proclaim them, in a loud and audible voice, to the bystanders, and invite bids, in conformity therewith.

The administrator of an estate, is the legal vendor of the property at probate sale, whose declarations are to govern, in regard to its conditions and terms, and the legal warranty resulting therefrom.

The sale of property legally made by the administrator, binds the heirs in warranty.

The conversations of bystanders, at a probate sale, with a purchaser, in which he is apprised of redhibitory vices in the property, before it is bid off, will not be admitted to exclude the legal warranty claimed, unless they go to establish the fact, that the redhibitory vices complained of, had been declared by the vendor to the purchaser.

The crier's declarations at a probate sale, unauthorised by the vendor, are inadmissible in evidence, to show the buyer was thereby apprised of the redhibitory vices in the property sold, before he bid for it.

The plaintiff sues as the representative and administrator of the estate of Thomas Grimball, deceased, to recover the amount of a note of three hundred and seventy dollars, and one of fourteen dollars and twelve and a half cents, executed by the defendant, Brown, as principal, and Flint as his surety. The plaintiff alleges, that the first note was given as a part of the price of two slaves, purchased by Brown, at the sale of Grimball's succession.

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The defendants severally excepted, and denied that the plaintiff was administrator, as he represents himself to be, which exceptions were overruled.

Brown admitted the execution of the notes, but alleged the slaves, for which one of the notes was given in part payment, were afflicted with redhibitory vices, which rendered them valueless, &c.

Flint admitted he signed the notes sued, as surety of his co-defendant, and set up the same defence.

The evidence shows, that the slaves, for which the note of three hundred and seventy dollars was given in part payment of the price, were purchased at the probate sale of Thomas Grimball's succession, by Brown. One of them sold for seven hundred and eleven dollars, and the other for four hundred dollars. Flint endorsed the notes for his co-defendant, and finally took the slaves into his possession.

The defendants claim a rescission of the sale, on account of redhibitory defects in the slaves, at the time they purchased them.

"Stafford, sworn for plaintiff, says, he attended the sale of Thomas Grimball's succession. That Joseph Scott and Joseph Boon cried the sale of the negroes in question. *Witness was told by Mr. Grimball, to tell Boon,* who was crying the negroes, that one of them, (naming him) was not sound, *which was proclaimed by Boon.* Judge Scott, the parish judge, was present, but appeared unwell. These slaves were not sold for near as much as others, on account of their sickness and defects. Witness told Brown, that one of the slaves was sickly, had a bad cough, and discharged blood. This was the day before the sale, and he told him the same thing on the day of sale. Witness would have bid three hundred dollars more for him, had he been sound. Witness bid five hundred dollars for the boy. The negro himself told Brown, he had a bad cough and discharged blood. The other negro is crippled, and was so at the time of sale."

The defendants in a supplemental answer, alleged, that the crippled slave was "*a runaway and great thief.*" The proof supported this allegation. It also appeared from the testimo-

ny of several witnesses, that the other slave was sickly and incapable of rendering much service.

The conversations of two or three persons with Brown, before, and at the time of the sale, were introduced in evidence, to show that he was apprised by a physician, who examined the slaves, that they were defective, on account of redhibitory vices. This testimony was excepted to by the defendants.

There was no tender of the slaves in accordance with the prayer for a rescission of the sale. The jury returned a verdict for the plaintiff. After an unsuccessful effort to obtain a new trial, judgment was rendered in conformity to the verdict. The defendants appealed.

Winn for the plaintiff.

1. The defendants have never tendered the slaves, in order to have a rescission of the sale, and it is now out of their power to return them. They cannot claim a rescission of the sale, before this is done; until the vendee offer to return the slave, he cannot have an action for the price, and by consequence, for the rescission of the sale. 4 *La. Reports*, 198.

2. It appears by Stafford's testimony, that Mr. Grimball, (one of the heirs) told him to tell the crier, that one of the slaves was not sound, which was proclaimed by the crier. Now the Code declares, that the buyer cannot maintain the redhibitory action, if the seller has declared the vice to him before, or at the time of the sale. *La. Code*, 2498.

3. Testimonial proof is admissible and competent evidence of the declarations of a vendor or seller at a sale. This part of the Code has been adjudicated on by this court. *La. Code*, 2498. 6 *Martin, N. S.* 539.

4. The testimony of Stafford goes fully to show the slaves were unsound, and sold and declared to be so, at the sale. He expressly says, he would have bid three hundred dollars more, for one of them, had he been sound.

5. The auctioneer was, in this sale, the agent of the estate of Grimball, acting too as a ministerial officer, making a probate sale, and for all legal purposes, in reference to the present case, was the seller.

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6. Heirs are subject to the same legal warranty, to which a vendor is subject, and they ought not to be precluded from showing, by testimonial proof, that the redhibitory defects were declared to the buyer, at and before the sale. *La. Code*, 2602, *vide also, chap.* 10, § 2, *under the title of sale.*

7. The provisions of the Code, which require that the vendor or seller, shall give to the auctioneer in writing, the conditions and terms of sale, who is to proclaim them, do not exclude the privilege conferred by article 2458, of showing, by testimonial proof, that the redhibitory defects were declared. *La. Code*, 2584.

8. Redhibition is defined to be the avoidance of a sale, on account of some defect or vice in the thing sold, that it must be supposed the buyer would not have purchased, had he known the vice. The *argumentum in contrario sensu*, forces the construction, that if the buyer did know of the existence of the defects, and purchased with his eyes open, he must abide the consequences. Testimonial proof is admissible to show this knowledge in the buyer, and which is shown in this case.

Flint, for the defendants, insisted, that testimonial proof could not be received, to contradict the *procès verbal*, or written sale of these slaves. There is no mention made of the redhibitory defects being declared by the seller or auctioneer, in the *procès verbal* of this sale, which must be conclusive on this point.

2. It was not necessary to tender the slaves expressly, in praying for a rescission of the sale. In answering to the suit, a tender is necessarily involved, when a rescission of the sale is claimed and set up in the defence.

Martin J., delivered the opinion of the court.

The defendants being sued for the price of two slaves, purchased by Brown, at the sale of Thomas Grimball's estate, by order of the judge of probates, resisted the claim, on account of alleged redhibitory defects and vices in the slaves

thus purchased. Judgment was rendered against them for the amount claimed, and they appealed.

The counsel for the defendants and appellants, has drawn the attention of the court, to a bill of exceptions taken to the admission of evidence, of the declarations of a person, whom the parish judge called to his aid at the sale, as a crier; and of conversations of several persons, with one of the defendants, while the sale was actually going on.

Redhibitory defects or vices which are made known by the vendor to the vendee, at or before the sale, cannot be urged in avoidance, or in any manner set up against the sale.

Parole evidence is admissible to prove the declarations of a vendor in relation to the redhibitory vices of slaves at or before the sale.

The counsel for the plaintiff contends, that the declarations of the crier were properly admitted, as they were made in presence of the parish judge, and by the directions of a person by the name of Grimball, whom he alleges, was one of the heirs.

The Louisiana Code, article 2498 provides, that, the vendee cannot urge redhibitory defects, which were made known to him by the vendor, at or before the time of sale; and authorises parole evidence of these declarations.

The plaintiff further contends, that the parish judge, acting as auctioneer, was the agent of the vendor, and as such, his declarations are those of the latter; that an auctioneer may employ a crier, whose statements proclaimed and declared to the bystanders or the company, are considered as proclaimed by the auctioneer himself, and consequently by the vendor, whose agent the auctioneer is, in such cases.

It is the duty of auctioneers to receive the conditions of a sale in writing from the vendor, and to read and proclaim them in a loud and audible voice to the bystanders, and invite bids in conformity therewith.

The Louisiana Code, article 2495, requires the auctioneer, after having received the conditions of the sale in writing, from the person offering the property for sale, to read and proclaim them in a loud and audible voice to the company, and then invite bids in conformity to those conditions.

Auctioneers, especially those living out of New-Orleans, and in the several parishes where there is no auctioneer but the parish judge, are not, strictly speaking, the *chosen*, though they may be the *legal* agents of the vendor; and we doubt whether they be more than the legal agents, in places in which there are two or more auctioneers. The mere legal agent, has no authority, but that which the law confers.

The mere legal agent appointed to sell property by authority of law, has no powers but those conferred by law.

The written conditions, which the Louisiana Code seems to require, cannot certainly be changed, without the posterior

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act of the vendor, and he who contends, that such *an act* has taken place, must show it.

In the present case, it appears, that the parish judge called on a person then present, to aid him in crying the sale. It is also shown, that a person by the name of *Grimball*, who was present at the same time, directed that the crier might proclaim and declare to the company, the redhibitory defects in the slaves, which are now complained of, and which he did, in the presence of the parish judge.

The administrator of an estate is the legal vendor of the property at probate sale, whose declarations are to govern in regard to its conditions and terms, and the legal warranty resulting therefrom.

The sale was provoked by Hawkins, the administrator of Grimball's estate, of which the slaves in question constituted a part. The auctioneer or parish judge, was bound to read and proclaim the written conditions of sale, given to him by Hawkins, the administrator. It is to them we are to look, in order to ascertain whether the legal warranty, on which the defendants rely, and claim the benefit, was excluded or not. The administrator was the vendor. His sale, it is true, bound the heirs of Grimball to the legal warranty; but this court is not ready to say, that if any of the heirs had directed the declarations, concerning the redhibitory vices to be made by the auctioneer or crier, the purchaser would not have been bound thereby. But we are compelled to say, that no declaration made by a stranger, can have the same effect.

The sale of property legally made by the administrator binds the heirs in warranty.

The conversations of bystanders at a probate sale with a purchaser, in which he is apprised of redhibitory vices in the property before it is bid off, will not be admitted to exclude the legal warranty claimed, unless they go to establish the fact that the redhibitory vices complained of had been declared by the vendor to the purchaser.

The conversations of bystanders, with either of the defendants, were in the opinion of the court, improperly admitted to exclude the legal warranty relied on, and the benefit of which is claimed by the defendants, unless they tended to establish the fact, that the redhibitory vices complained of, had been declared by the vendor to the defendants.

In all cases of a trial by jury, the party claiming it, is entitled to a verdict, uninfluenced by illegal evidence. According to this principle, the case must be remanded for another trial. This renders it unnecessary for the court, in the present state of the case, to examine any of the other questions or points of law, arising in the cause.

The crier's declarations at a probate sale unauthorised by the vendor, are inadmissible in evidence to show the buyer was thereby apprised

It is, therefore, ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and

reversed; the verdict set aside, with directions to the court, not to allow parole evidence of the crier's declarations, unauthorised by the vendor, or of the conversations of bystanders, with the defendants, unless they tend to show, that the redhibitory defects and vices in the slaves, were declared by the vendor to the vendee, before, or at the time of the sale; the costs of the appeal to be borne by the plaintiff and appellee.